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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 330

PETER L. McDONNELL, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 31, 1932

CERTIORARI GRANTED OCTOBER 24, 1932

(37,027)

(37,027)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 330

PETER L. McDONNELL, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1932

[fol. 1]

IN THE COURT OF CLAIMS

No. K-488

PETER L. MCDONNELL, Plaintiff,

v.

THE UNITED STATES, Defendant

1. PETITION—Filed November 4, 1929

To the Honorable the Chief Justice and Judges of the Court of Claims:

1. The plaintiff is an individual with his residence at 325 West End Avenue, New York, N. Y.

2. The plaintiff and the partnership of which he was a member during the year 1917—namely, McDonnell & Truda, 5 State Street, New York, N. Y.—duly filed their income-tax returns for the year 1917 and paid the taxes shown thereon to be due.

3. In March, 1923, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership of McDonnell & Truda of an additional tax for the year 1917 in the amount of $100,005.14. On December 17, 1925, [fol. 2] the Commissioner advised the partnership that this assessment was erroneous and that the partnership had been overassessed to the extent of $75,141.86. The letter of December 17, 1925, states:

"The audit of the partnership cannot be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

4. Under date of February 12, 1926, the Bureau further advised plaintiff as follows:

"Reference is made to Bureau letter dated November 30, 1925, wherein you were advised that an audit of your

income tax return for the year 1917 resulted in the determination of a deficiency in tax of $6,877.62 due to assessment under the provisions of Section 210 of the Revenue Act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was enclosed for the purpose, in order that adjustment could be made of the overassessment of $75,-141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Dominic A. Truda.

"You are, therefore, requested to execute and return to this office, the enclosed form of waiver within fifteen days from the date of this letter, in order that adjustment of [fol. 3] the partnership's overassessment and your resulting additional tax liability may be made."

5. On February 23, 1926, the plaintiff, acting under duress and in the fear of being arbitrarily penalized, both individually and through an increase in the partnership tax, submitted to the demand made upon him by the Treasury Department by filing a purported waiver of the statute of limitations for making any assessment for the year 1917; said waiver by its terms purported to extend the time within which the Commissioner of Internal Revenue could assess additional income taxes until December 31, 1926.

6. Under date of May 22, 1926, the Commissioner issued what is commonly called a thirty-day letter to the plaintiff. This letter proposed an additional assessment of $6,877.62 and enclosed a "Waiver of Right to File a Petition with the United States Board of Tax Appeals," which plaintiff did not execute. The letter provides in part as follows:

"If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of section 274 of the Revenue Act of 1926. Should you not agree to the defi-

ciency as finally determined by the Commissioner, you will be allowed sixty days from the mailing of the registered letter in which to file a petition with the United States [fol. 4] Board of Tax Appeals for a redetermination of the deficiency."

7. Under date of May 26, 1926, plaintiff filed a protest against the proposed additional tax of $6,877.62 as set forth in Bureau letter dated May 22, 1926.

8. Under date of July 12, 1926, the Commissioner of Internal Revenue wrote plaintiff:

"After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that your contentions have been allowed, and the computation of tax as shown in your brief dated May 26, 1926, disclosing a deficiency in tax of $4,386.15, has been accepted as correct, and the case forwarded for assessment."

9. On October 9, 1926, the Commissioner assessed against the plaintiff an additional tax of $4,386.15 despite the provisions of section 274(a) of the Revenue Act of 1926, which provides:

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282 or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint [fol. 5] or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60 day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such

proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

Plaintiff has not waived this statutory requirement.

10. On October 23, 1926, plaintiff paid to the collector of internal revenue for the Second District of New York $4,549.03, which included the deficiency referred to in paragraphs 8 and 9 together with interest. Two claims for the refund of the amount were duly filed and were denied under dates of February 9, 1929, and July 25, 1929.

11. The claims for refund filed by this plaintiff were based on the contentions that the waiver filed by this plaintiff was invalid; that this tax was collected after the running of the statutory period of limitation applicable thereto, and that the Commissioner of Internal Revenue failed to follow the specific statutory provisions relative to the assessment and collection of the tax.

12. The statutory provisions relied upon, in addition to Section 274(a) of the Revenue Act of 1926, are:

The Revenue Act of 1924:

[fol. 6] "Sec. 277(a) (2). The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, * * * shall be assessed within five years after the return was filed, and no proceedings in court for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 278(c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

The Revenue Act of 1926:

"Sec. 1106(a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of

such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The Revenue Act of 1928:

"Sec. 276(b). Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the [fol. 7] tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

"Sec. 607. Effect of Expiration of Period of Limitation Against the United States.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (Whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

13. By reason of the action of the Commissioner of Internal Revenue in refusing to refund to this plaintiff the sum of $4,549.03, together with interest from the date of payment, the whole of said amount, plus interest, is now wrongfully and unlawfully withheld from the plaintiff without his consent and against his will by the United States.

14. No other action has been had on said claims in Congress or by any of the departments; no other person than the plaintiff is the owner thereof or interested therein; no assignment or transfer of these claims, or any part thereof or interest therein, has been made; plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The plaintiff has at all times borne true faith and allegiance to the Govern-

[fol. 8] ment of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Wherefore plaintiff asks judgment against the United States in the sum of four thousand five hundred and forty-nine dollars and three cents ($4,549.03), with interest thereon from date of payment.

Peter L. McDonnell, by Robert Ash, Attorney for Plaintiff, Munsey Building, Washington, D. C.

Duly sworn to by Peter L. McDonnell. Jurat omitted in printing.

[fols. 9 & 10] II. General Traverse—Filed December 14, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission of Case

On October 13, 1931, this case was argued and submitted on merits by Mr. Robert Ash for the plaintiff, and by Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 11] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Littleton, J.**—Entered May 31, 1932

Mr. Robert Ash for the plaintiff.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

Plaintiff sues to recover $4,549.03, with interest, income tax paid for 1917, on the ground that a waiver of the stat-

ute of limitation executed by him was invalid and that the tax was therefore collected after the expiration of the statute of limitation.

Special Findings of Fact

1. Plaintiff filed his individual income-tax return for 1917 April 1, 1918, and paid the tax shown thereon to be due. The partnership of McDonnell & Truda, of which he was a member during 1917, filed its return of income on Form 1065 on April 1, 1918, and paid the profits tax computed thereon under section 209 of the revenue act of 1917.

March 18, 1923, the commissioner made a jeopardy assessment of $100,005.14, excess-profits tax for 1917, against the partnership and a claim in abatement was filed protesting the amount of the tax assessed.

2. November 30, 1925, the Committee on Appeals and Review having considered the case of the partnership and having recommended that the profits tax of the partnership for 1917 be computed under the special-relief provisions of section 210, revenue act of 1917, the commissioner wrote the plaintiff the following letter:

"Reference is made to the appeal dated March 24, 1924, of the partnership of McDonnell and Truda, 5 State Street, New York, New York, of which you are a member, for assessment of its excess-profits tax for 1917 under the provisions of section 210 of the revenue act of 1917.

"You are advised that consideration of the application has been completed, indicating an overassessment of $75,141.86. However, a reduction of the excess-profits tax liability of the partnership necessitates a corresponding increase in the distributive interests of the partners and a corresponding increase in the taxable net income, resulting in additional tax liability for each partner. Your additional tax liability is $6,877.62.

[fol. 12] "Inasmuch as the limitation of time within which to assess the $6,877.62 has expired, you are requested to execute and return to this office the enclosed form of waiver, to facilitate the adjustments of the partnership's overassessment and your resulting additional tax liability."

3. On December 17, 1925, the commissioner mailed the following letter to the partnership:

"Receipt is acknowledged of your letter dated December 10, 1925, wherein you state that a letter has not as yet been received by you showing the amount of income and excess profits tax finally determined to be due for the year 1917, and requesting that this letter be forwarded before compliance with the request of this office in bureau letters dated November 30, 1925, that waivers be furnished for the partners, Peter L. McDonnell and Dominic A. Truda.

"In the letters to Peter L. McDonnell and Dominic A. Truda mentioned above, they were advised that an audit of the partnership of McDonnell and Truda under section 210 of the revenue act of 1917 resulted in the determination of an overassessment of $75,141.86.

"The audit of the partnership can not be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

4. February 12, 1926, the Bureau of Internal Revenue, not having received a reply from the plaintiff to the letter of November 30, 1925, again wrote him as follows:

"Reference is made to bureau letter, dated November 30, 1925, wherein you were advised that an audit of your income-tax return for the year 1917 resulted in the determination of a deficiency in tax of $6,877.62 due to assessment under the provisions of section 210 of the revenue act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was inclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Dominic A. Truda.

"You are, therefore, requested to execute and return to this office the inclosed form of waiver within fifteen days from the date of this letter in order that adjustment of the partnership's overassessment and your resulting additional-tax liability may be made."

February 23, 1926, plaintiff and the commissioner consented in writing to the assessment and collection of any tax determined to be due by the commissioner for 1917 beyond the period of limitation provided in the statute. This consent waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts, to the extent of $6,877.62 conditioned upon the proposed additional assessment against McDonnell & Truda for the year 1917 of excess-profits tax, the sum being fixed at $24,863.28." This waiver was accompanied by a letter signed by plain-[fol. 13] tiff's representative and attorney in fact, dated February 23, 1926, in part as follows:

"Agreeable to your request, these waivers have been signed and are herewith inclosed * * *.

"I wish to state that it has always been the desire of these two gentlemen to pay all the income taxes justly due from them without any attempt to evade such payments by any means whatsoever * * *.

"When the waivers for 1917 were requested by you they were not withheld in an effort to evade the tax, but it would impose a great hardship on them to surrender a statutory right, which would inflict a tax of some $12,000.00 on them * * *. However, as an evidence of good faith, these waivers have been signed and forwarded to you.

"In requesting a conference I feel sure that by getting together with your conferee in Washington we can finally arrive at an amount which is acceptable to the commissioner and Messrs. McDonnell & Truda, which amount can then be paid and all tax matters for 1917 closed once and for all. We have no desire to take any part of the taxes in controversy before the Tax Board and are quite eager to settle it as expeditiously as possible within the Internal Revenue Department. The waivers are sent along with this letter as evidence of good faith in order that your conferee may feel thoroughly sure that no unfair advantage is sought by groundless appeals or other delays."

5. May 22, 1926, the commissioner mailed to the partnership a letter accompanied by a detailed statement showing his final determination of the 1917 tax liability of the part-

nership. This letter reduced the additional assessment made against the partnership of $100,005.14 to $24,863.28, and advised the partnership, as follows:

"You are advised that after careful consideration and review, your application for assessment of your excess-profits tax under the provisions of section 210 of the revenue act of 1917 has been allowed. Your excess-profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

* * * * * * *

"In accordance with the above conclusions, your claim for the abatement of $100,005.14 will be rejected for $24,863.28."

A certificate of overassessment was duly issued to the partnership.

6. May 22, 1926, the commissioner notified the plaintiff by what is commonly known as a "thirty-day letter" of a proposed assessment of a deficiency of $6,877.62 against him for 1917, as follows:

"An audit of your income-tax return for the calendar year 1917 has resulted in a determination of a deficiency in tax of $6,877.62, as shown in the attached statement.

* * * * * * *

"If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of section 274 of the revenue act of 1926. Should you not agree to the deficiency as finally determined by the commissioner, you will be allowed [fol. 14] sixty days from the mailing of the registered letter in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency."

There was inclosed with this letter to the plaintiff a "Waiver of Right to File a Petition with the United States Board of Tax Appeals." Plaintiff did not execute the waiver, but on May 26, 1926, filed written protest against the proposed additional tax of $6,877.62 and set forth a re-

computation thereof showing a deficiency due in the amount of $4,386.15, instead of the larger amount shown due by the commissioner's letter.

This protest was considered by the commissioner who thereafter, on July 12, 1926, notified the plaintiff of his final determination as follows: "After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that your contentions have been allowed, and the computation of tax as shown in your brief dated May 26, 1926, disclosing a deficiency in tax of $4,386.15, has been accepted as correct, and the case forwarded for assessment." Thereafter, on October 9, 1926, the commissioner made an assessment against the plaintiff of the additional tax so determined in the amount of $4,386.15. This amount, together with interest thereon, aggregating $4,549.03, was paid by the plaintiff to the Collector of Internal Revenue for the Second District of New York on October 23, 1926.

7. Thereafter plaintiff filed two claims for refund on December 27, 1928, and May 31, 1929, respectively, alleging that the consent filed by him waiving the statute of limitation was invalid; that the tax was therefore collected after the running of the applicable statutory period of limitation; and that the commissioner had failed to comply with the statutory requirements for the assessment and collection of the tax. These claims for refund were rejected on schedules dated March 6, 1929, and July 25, 1919, respectively.

Conclusion of Law.

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The first contention of the plaintiff is that the written consent executed by him waiving the statute of limitation

for assessment and collection of a deficiency against him for 1917 was executed after the expiration of the statute of limitation; that it was obtained by duress and was, therefore, invalid. He further insists that since the period of limitation for making an additional assessment for 1917 expired prior to June 2, 1924, and the waiver in question was given after that date and before the enactment of the revenue act of 1926, the waiver in question is invalid under the decision of the Circuit Court of Appeals for the Second [fol. 15] Circuit in Uncasville Mfg. Co. v. Commissioner, decided February 1, 1932. We find no merit in the contention of the plaintiff that the waiver was invalid because executed after the expiration of the statute of limitations, Stange v. United States, 282 U. S. 270, nor in the claim that it was obtained under duress.

The matter of the computation of the partnership's profits tax under the special-relief provisions of section 210 of the revenue act of 1917 was entirely within the discretion of the Commissioner. Williamsport Wire Rope Co. v. United States, 277 U. S. 551. Had the commissioner proceeded to collect from the partnership the excess-profits tax due by it under the normal tax provisions of the revenue act of 1917 on its income for that year, as he had a right to do, such tax would have amounted to $100,005,14, and there would have been no overassessment against the partnership and no additional tax due by the partners. It can not be said that a waiver executed by the plaintiff in order to obtain a reduction in the amount of the profits tax due by the partnership through a computation under the relief provisions of the statute was exacted by duress. He executed the waiver because it was to his advantage to do so. The commissioner was not required to compute the tax of the partnership under the special-relief provision, and had he declined to do so neither the partnership nor the plaintiff would have had any legal right to complain. Maas v. United States, 282 U. S. 822. Any adjustment in the profits-tax liability of the partnership necessitated a corresponding adjustment in the distributive interests of the partners and a reduction of partnership income increased the taxable income of the individual partners. The commissioner therefore advised the plaintiff and the other partner of McDonnell & Truda that if waivers of the statute of limitation with respect to their individual tax liability for 1917 should be

filed by them he would give consideration to the determination of the profits tax of the partnership under the special-relief provisions of section 210. Accordingly the plaintiff duly executed such waiver. He was not forced to do so, and the results obtained as a result of the execution of the waiver were favorable to him.

The case of Uncasville Mfg. Co., supra, holds that where the statutory period expired prior to June 2, 1924, waivers executed after that date and before the approval of the revenue act of 1926 were invalid.

We have carefully considered the decision of the learned Circuit Court of Appeals for the Second Circuit, but we are unable to concur in the conclusion that a waiver executed under such circumstances is invalid and that a tax collected on the basis thereof must be refunded. Burnet v. Chicago Railway Equipment Co., 282 U. S. 295; Brown & Sons Lumber Co. v. Burnet, 282 U. S. 183; Aiken v. Burnet, 282 U. S. 277; Stange v. United States, supra.

In the Uncasville case, the court said:

"Confessedly, had the time for assessment expired after June 2, 1924, the waivers would have been good, though executed after the expiry of the time to assess or collect. (Burnet v. Railway Equipment Company, 282 U. S. 295.) However, section 278 (c) of the act of 1924 declared that the section as a whole should not allow the assessment or collection of a tax, barred by existing limitations on June 2, 1924. Subdivision (c) of section 278 is necessary to the assess- [fol. 16] ments because they depend upon the waivers, and there was no other law regulating waivers in effect after June 2, 1924. Thus, if subdivision (c) confines subdivision (c) to cases where the assessment was not barred on June 2, 1924, the company is right. In spite of some intimation in Burnet v. Chicago Railway Company which, however, expressly reserved the point, we think that an analysis of section 278 as a whole does not admit of any other construction. * * *"

In none of the cases cited was collection barred on the date of the enactment of the revenue act of 1924; however, in Aiken v. Burnet, supra, a waiver had been given before the enactment of the revenue act of 1921, which fixed a limitation period of five years. The court held that the taxpayer

had sufficient authority, in the absence of any statute, to execute a valid waiver, and that the commissioner, under the same circumstances, had authority to accept such waiver and bind the Government. The court further held that a waiver signed is valid to extend the subsequently enacted limitation upon collection. Other waivers were secured in the Aiken case under the revenue act of 1921, and were held valid to authorize assessment on March 12, 1925. Again in Brown & Sons Lumber Co. v. Burnet, supra, the court infers that the last of the three waivers involved in that case would have been sufficient standing alone. A footnote in the opinion states, "Inasmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection, as was done by the lower court. See 38 F. (2d) 428." In Brown & Sons Lumber Company case, supra, the first waiver was filed December 13, 1920, and the second on December 10, 1923; the third waiver was filed October 25, 1924. In the Uncasville Mfg. Company case the court construed section 278 (c) of the revenue act of 1924 as a prohibition upon the giving of a waiver by a taxpayer and the acceptance thereof by the commissioner. We are unable to find any provision in the 1924 revenue act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitation, nor do we find anything in such act prohibiting the commissioner's acceptance of such waiver. This view seems not to have been presented in the Uncasville Mfg. Company case, supra; it was not commented upon by the court in its opinion. The court merely stated that subdivision (c) of section 278 of the revenue act of 1924 limits the preceding subdivision (c) of section 278 so that subdivision (c) does not authorize the extension of time for assessment by a waiver executed after the enactment of the revenue act of 1924 where the time for assessment expired prior to the enactment of that act. In Burnet v. Chicago Railway Equipment Co., supra in footnote 5, page 300, to the statement in the opinion that "We need not determine whether respondent is correct in assuming that section 278 (c) qualifies section 278 (c) in respect to waivers on assessment of taxes barred prior to June 2, 1924," it is stated that "Subdivision (c) can not be said to qualify every other subdivision in section 278. Nothing indicates an intention to have it limit the effect of section 278 (a) which permits assessment to be made or suit

to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * *Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers.*" (Italics ours.) We conclude, therefore, that the revenue act of 1924 does not [fols. 17 & 18] preclude a taxpayer from waiving the benefit of the statute of limitation, and that a waiver given after the enactment of the revenue act of 1924, in a case where the statutory limitation had expired prior thereto, and before February 26, 1926, is valid.

The plaintiff next contends that the commissioner failed to comply with the statutory requirement of assessment and collection of the tax for the reason that he did not send to the plaintiff a notice of the deficiency, as required by section 274 (a) of the revenue act of 1926. We think this contention of the plaintiff is unimportant as affecting his right to institute a proceeding before the United States Board of Tax Appeals under the revenue act of 1926 upon receipt of notice of assessment, which would have constituted the commissioner's final determination had the commissioner failed to mail him a formal notice prior to assessment. However, the facts show that the commissioner fully complied with the requirements of section 274. May 22, 1926, the commissioner notified the plaintiff of a proposed assessment of a deficiency for 1917, allowing him thirty days within which to protest the same or to execute a waiver of his right to file a petition with the Board of Tax Appeals consenting to immediate assessment. The waiver was not executed, but plaintiff filed a protest setting forth that the correct tax was $4,386.15 instead of $4,549.03, as proposed by the commissioner in the thirty-day letter. The protest was considered and allowed and thereafter, on July 12, 1926, the commissioner sent the plaintiff a written notice of his final determination of a deficiency for 1917 in the amount of $4,386.15. This notice complied with section 274 (a) of the revenue act of 1926. The commissioner was not required specifically to advise plaintiff in this notice of his right to institute a proceeding before the board. The plaintiff did not institute a proceeding before the Board of Tax Appeals with respect to this deficiency and thereafter, on October 9, 1926, more than sixty days after the mailing by the commissioner of the notice of his final determination, the commissioner assessed the deficiency and collected the same Octo-

ber 23, 1926. Section 274 (a) of the revenue act of 1926 does not require any special form of notice, but provides only that if the commissioner determines that there is a deficiency he is authorized to send notice of such deficiency to the taxpayer by registered mail. The notice of July 12, 1926, which was received by the plaintiff, complied with this requirement.

The petition is dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge, and Booth, Chief Justice, concur.

[fols. 19 & 20] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 31st day of May, A. D., 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the Court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law. No printing having been done by the Court, no costs are taxed.

[fol. 21] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,027. Court of Claims. Term No. 330. Peter L. McDonnell, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1932. File No. 37,027.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question of the validity of the waiver under Sec. 278 (c) of the Revenue Act of 1924.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 331

DOMINIC A. TRUDA, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 31, 1932

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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D & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1932

[fol. 1]

IN THE COURT OF CLAIMS

No. L-15

DOMINIC A. TRUDA, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed January 22, 1930

To the Honorable the Chief Justice and Judges of the Court of Claims:

I

The plaintiff is an individual with his residence at 560 Westminster Road, Brooklyn, N. Y.

II

The plaintiff and the partnership of which he was a member during the year 1917—namely, McDonnell & Truda, 5 State Street, New York, N. Y.—duly filed their income-tax [fol. 2] returns for the year 1917 and paid the taxes shown thereon to be due.

III

In March, 1923, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership of McDonnell & Truda of an additional tax for the year 1917 in the amount of $100,005.14. On December 17, 1925, the Commissioner advised the partnership that this assessment was erroneous and that the partnership had been overassessed to the extent of $75,141.86. The letter of December 17, 1925, states:

"The audit of the partnership cannot be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

IV

On February 12, 1926, C. R. Nash, Assistant to the Commissioner, wrote the plaintiff as follows:

"Reference is made to Bureau letter dated November 30, 1925, wherein you were advised that an audit of your income tax return for the year 1917 resulted in the determination of a deficiency in tax of $5,485.18 due to assessment under the provisions of Section 210 of the Revenue Act of 1917 of the partnership of McDonnell and Truda, of which you are [fol. 3] a partner, and requesting you to execute a waiver which was enclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Peter L. McDonnell.

"You are, therefore, requested to execute and return to this office, the enclosed form of waiver within fifteen days from the date of this letter, in order that adjustment of the partnership's over assessment and your resulting additional tax liability may be made.

"In your letter of transmittal, reference should be made to the symbols IT:E:SM SBD-26737."

V

The plaintiff, acting under duress and in the fear of being arbitrarily penalized, both individually and through an increase in the partnership tax, submitted to the demand made upon him by the Treasury Department by filing a purported waiver of the statute of limitations for making any assessment for the year 1917; said waiver by its terms purporting to extend the time within which the Commissioner of Internal Revenue could assess additional income taxes until December 31, 1926.

VI

On May 22, 1926, the Commissioner issued what is commonly called a "30-day letter" to the plaintiff. This letter [fol. 4] proposed an additional assessment of $5,485.18 and

enclosed a "Waiver of right to file a petition with the United States Board of Tax Appeals," which plaintiff executed.

VII

On July 17, 1926, an assessment of $5,485.18 tax and interest of $128.64 was assessed against the plaintiff, and payment was made to the proper Collector of Internal Revenue on August 13, 1926.

VIII

Claim for refund in the amount of $5,613.82 was duly filed and disallowed by the Commissioner on a schedule dated July 25, 1929. The claim for refund was based on the contentions that the waiver, mentioned in paragraph V of this petition was invalid, and that the tax was collected after the running of the statute of limitations properly applicable thereto.

IX

The statutory provisions relied upon are:

The Revenue Act of 1921:

"Sec. 250(*d*). * * * the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the [fol. 5] Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

The Revenue Act of 1924:

"Sec. 277(a) (2). The amount of income, excess-profits, and war profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court for

the collection of such taxes shall be begun after the expiration of such period."

"Sec. 278(c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

The Revenue Act of 1926:

Sec. 277(a) (3). The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 1106(a). The bar of the statute of limitations [fol. 6] against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The Revenue Act of 1928:

"Sec. 276(b). Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agred upon."

"Sec. 607. Effect of Expiration of Period of Limitation Against the United States.—Any tax (or interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be

credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

[fol. 7]

X

By reason of the action of the Commissioner of Internal Revenue in refusing to refund to this plaintiff the sum of $5,613.82, together with interest from the date of payment, the whole of said amount, plus interest, is now wrongfully and unlawfully withheld from the plaintiff without his consent and against his will by the United States.

XI

No other action has been had on said claim in Congress or by any of the departments; no other person than the plaintiff is the owner thereof or interested therein; no assignment or transfer of these claims, or any part thereof or interest therein, has been made; plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The plaintiff has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Wherefore plaintiff asks judgment against the United States in the sum of $5,613.82 with interest thereon from August 13, 1926.

Dominic A. Truda, by Robert Ash, Thomas J. Reilly, Munsey Building, Washington, D. C., Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by Dominic A. Truda. Jurat omitted in printing.*

[fols. 9 & 10] II. General Traverse—Filed March 1, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles P. Sisson, Assistant Attorney General.
AJL/CFK.

III. Argument and Submission of Case

On October 13, 1931, this case was argued and submitted on merits by Mr. Robert Ash for the plaintiff, and by Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 11] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Littleton, J.**—Entered May 31, 1932

Mr. Robert Ash for the plaintiff.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

This suit is for the recovery of $5,613.82, with interest from August 13, 1926, income tax paid for the calendar year 1917. Plaintiff claims that a waiver of the statute of limitation executed by him was invalid and the tax was therefore collected after the expiration of the time allowed by law.

Special Findings of Fact

1. Plaintiff filed his individual income-tax return for 1917, March 29, 1918, and paid the tax shown thereon to be due. The partnership of McDonnell & Truda, of which he was a member during 1917, filed its return of income on Form 1065 on April 1, 1918, and paid the tax shown thereon to be due.

March 18, 1923, the commissioner made a jeopardy assessment of $100,005.14, excess-profits tax for 1917, against the partnership, and a claim in abatement was filed protesting the amount of the tax assessed.

2. November 30, 1925, the Committee on Appeals and Review having considered the case of the partnership and having recommended that the profits tax of the partnership for 1917 be computed under the special relief provisions of section 210, revenue act of 1917, the commissioner advised the plaintiff as follows:

"Reference is made to the appeal dated March 24, 1924, of the partnership of McDonnell and Truda, 5 State Street, New York, New York, of which you are a member, for as-

sessment of its excess-profits tax for 1917 under the provisions of section 210 of the revenue act of 1917.

"You are advised that consideration of the application has been completed, indicating an overassessment of $75,-141.86. However, a reduction of the excess-profits tax liability of the partnership necessitates a corresponding increase in the distributive interests of the partners and a corresponding increase in the taxable net income, resulting in additional tax liabilty for each partner. Your additional tax liability is $5,485.18.

[fol. 12] "Inasmuch as the limitation of time within which to assess the $5,485.18 has expired, you are requested to execute and return to this office the enclosed form of waiver, to facilitate the adjustment of the partnership's overassessment and your resulting additional tax liability."

3. December 17, 1925, the commissioner mailed the following letter to the partnership:

"Receipt is acknowledged of your letter dated December 10, 1925, wherein you state that a letter has not as yet been received by you showing the amount of income and excess-profits tax finally determined to be due for the year 1917, and requesting that this letter be forwarded before compliance with the request of this office in bureau letters dated November 30, 1925, that waivers be furnished for the partners, Peter L. McDonnell and Dominic A. Truda.

"In the letters to Peter L. McDonnell and Dominic A. Truda mentioned above, they were advised that an audit of the partnership of McDonnell and Truda under section 210 of the revenue act of 1917 resulted in the determination of an overassessment of $75,141.86.

"The audit of the partnership can not be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

4. February 12, 1926, the Bureau of Internal Revenue, not having received a reply from the plaintiff to the letter of November 30, 1925, again wrote him as follows:

"Reference is made to bureau letter dated November 30, 1925, wherein you were advised that an audit of your in-

come-tax return for the year 1917 resulted in the determination of a deficiency in tax of $5,485.18 due to assessment under the provisions of section 210 of the revenue act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was inclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Peter L. McDonnell.

"You are, therefore, requested to execute and return to this office, the inclosed form of waiver within fifteen days from the date of this letter, in order that adjustment of the partnership's overassessment and your resulting additional tax liability may be made."

February 23, 1926, plaintiff and the commissioner consented in writing to the assessment and collection of any tax determined to be due by the commissioner for 1917 beyond the period of limitation provided in the statute. This consent waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts, to the extent of $5,485.18 conditioned upon the proposed additional assessment against McDonnell & Truda for the year 1917 of excess-profits tax, the sum being fixed as $24,863.28."

[fol. 13] This waiver was accompanied by a letter signed by plaintiff's representative and attorney in fact, dated February 23, 1926, in part as follows:

"Agreeable to your request, these waivers have been signed and are herewith enclosed * * *.

"I wish to state that it has always been the desire of these two gentlemen to pay all the income taxes justly due from them without any attempt to evade such payments by any means whatsoever * * *.

"When the waivers for 1917 were requested by you they were not withheld in an effort to evade the tax, but it did

impose a great hardship upon them to surrender a statutory right, which would inflict a tax of some $12,000.00 on them * * *. However, as an evidence of good faith, these waivers have been signed and forwarded to you.

"In requesting a conference I feel sure that by getting together with your conferee in Washington we can finally arrive at an amount which is acceptable to the commissioner and Messrs. McDonnell and Truda, which amount can then be paid and all tax matters for 1917 closed once and for all. We have no desire to take any part of the taxes in controversy before the Tax Board and are quite eager to settle it as expeditiously as possible within the Internal Revenue Department. The waivers are sent along with this letter as evidence of good faith in order that your conferee may feel thoroughly sure that no unfair advantage is sought by groundless appeals or other delays."

5. May 22, 1926, the commissioner mailed to the partnership a letter accompanied by a detailed statement showing his final determination of the 1917 tax liability of the partnership. This letter reduced the additional assessment made against the partnership of $100,005.14 to $24,863.28, and advised the partnership, as follows:

"You are advised that after careful consideration and review, your application for assessment of your excess profits tax under the provisions of section 210 of the revenue act of 1917 has been allowed. Your excess profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

* * * * * * *

"In accordance with the above conclusions, your claim for the abatement of $100,005.14 will be rejected for $24,863.28."

A certificate of overassessment was duly issued to the partnership.

6. May 22, 1926, the commissioner notified the plaintiff by what is commonly known as a "thirty-day letter" of a proposed assessment of a deficiency of $5,485.18 against him for 1917, as follows:

"An audit of your individual income-tax return for the calendar year 1917 has resulted in the determination of a deficiency in tax of $5,485.18, as shown in the attached statement.

* * * * * * *

"If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the commissioner finally determines that there is a [fol. 14] deficiency, you will be advised thereof by registered mail in accordance with the provisions of section 274 of the revenue act of 1926. Should you not agree to the deficiency as finally determined by the commissioner, you will be allowed sixty days from the mailing of the registered letter in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency."

There was inclosed with this letter to the plaintiff a "Waiver of right to file a petition with the United States Board of Tax Appeals," which plaintiff executed June 18, 1926, and filed June 21, 1926, in which he stated that "The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under section 274 (a) of the revenue act of 1926 and consents to the assessment and collection of a deficiency in tax for the year 1917 aggregating $5,485.18.

"This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under section 1106 of the revenue act of 1926."

7. July 17, 1926, the commissioner made an additional assessment of tax against the plaintiff of $5,485.18 and interest of $128.64, and payment thereof was made August 13, 1926.

December 24, 1928, plaintiff filed a claim for refund of $5,613.82, being the additional tax and interest so paid, on the ground that the waiver of the statute of limitations theretofore executed by him was invalid and that the amount claimed was collected after the running of the statute of limitation. The claim was rejected by the commissioner on a schedule dated July 25, 1929.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The question in this case is whether the waiver of the statute of limitation entered into between the plaintiff and the commissioner February 23, 1926, was invalid. We have considered and decided this question in Peter L. McDonnell v. United States, No. K-488, decided this date, in which it is held that the waiver was valid and that collection was therefore timely.

For the reasons stated in the McDonnell case, this plaintiff is not entitled to recover. The petition is dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge, and Booth, Chief Justice, concur.

[fols. 15 & 16] V. Judgment

At a Court of Claims held in the City of Washington on the 31st day of May, A. D., 1932, Judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

No printing having been done by the Court, no costs are taxed.

[fol. 17] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,028. Court of Claims. Term No. 331. Dominic A. Truda, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1932. File No. 37,028.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question of the validity of the waiver under Sec. 278 (e) of the Revenue Act of 1924.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
AUG 31 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 330

PETER L. McDONNELL, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

ROBERT ASH,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 330

PETER L. McDONNELL, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In support of his petition for a writ of certiorari to the Court of Claims the petitioner respectfully shows:

Statement of the Matter Involved.

April 1, 1918, the petitioner filed his income-tax return for 1917. On the same date the partnership, McDonnell & Truda, of which petitioner was a member, filed a return of income on Government Form 1065.

March 18, 1923, or thirteen days prior to the running of the statute of limitations for the assessment and collection of additional tax for 1917, the Commis-

sioner of Internal Revenue made a jeopardy assessment against the partnership McDonnell & Truda for the year 1917 in the amount of $100,005.14. The partnership filed a claim in abatement protesting the additional tax.

From the above it is apparent that the jeopardy assessment of $100,005.14, made against the partnership, could not lawfully be collected after April 1, 1924. See *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Russell* v. *United States*, 278 U. S. 181.

November 30, 1925, which was after the expiration of the statute of limitations as stated above, the Commissioner of Internal Revenue wrote the petitioner and his partner, Dominic A. Truda, that the jeopardy assessment of $100,005.14, made against the partnership, was in error and that there was due but $24,863.28 additional tax instead of $100,005.14 (R. 9). The Commissioner stated, however, that he would not reduce the said admittedly erroneous jeopardy assessment of $100,005.14 against the partnership to $24,863.28 unless the petitioner, against whom the statute of limitations had admittedly run, would sign a waiver of the statute of limitations and agree to pay an outlawed tax of $4,386.15 (R. 10, 11). A similar demand was made of the petitioner's partner.

Because of the threat of the Commissioner of Internal Revenue that he would proceed with the collection of the admittedly erroneous $75,141.86 portion of the above mentioned jeopardy assessment, and which was then barred, the petitioner, on February 23, 1926, executed a waiver of the statute of limitations for 1917 with reference to his personal liability.

As will be noted the waiver signed by the petitioner was executed after the enactment of the Revenue Act of 1924 (June 2, 1924) and before the enactment of the Revenue Act of 1926 (February 26, 1926). Section 278 of the 1924 Act provided that the statute of limitations could be waived but Section 278(*e*) specifically provided that this section did not authorize the collection of any tax which was barred prior to its enactment. The United States Circuit Court of Appeals for the Second Circuit, in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 Fed. (2d) 893, has, in direct conflict with the case at bar, held that collection could not legally be made under such circumstances. (See discussion, R. 13, 14.)

Despite the provisions of the statute as above stated the petitioner was compelled to pay and did pay on October 23, 1926, an additional tax of $4,386.15 plus interest of $162.88, or a total of $4,549.03.

A further error of the Court of Claims is as follows:

Section 273 of the Revenue Act of 1926 requires that the Commissioner of Internal Revenue must send by registered mail to taxpayers a notice of deficiency in the event he seeks to collect a deficiency in tax. The Commissioner sent no such registered mail notice in this case and the Court of Claims does not find that a registered mail notice was sent.

> "* * * When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." (*Botany Worsted Mills* v. *United States,* 278 U. S. 282, 289.)

It is settled that deficiencies in tax cannot be legally collected without the sending of the registered mail

notice of deficiency as provided in the statute. *J. H. Reese,* 15 B. T. A. 1261; *Dinwiddie Lampton,* 17 B. T. A. 649; *G. H. Connell,* 15 B. T. A. 1309.

Basis of Court of Claims Decision.

The Court of Claims decided in favor of the United States, holding:

(1) That the Circuit Court of Appeals for the Second Circuit was in error in its decision in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 Fed. (2d) 893, wherein the Circuit Court held that where the statute of limitations expired prior to June 2, 1924, the statute does not permit the execution of valid waivers of the statute of limitations between that date and February 26, 1926, the date of the passage of the Revenue Act of 1926.

(2) That the waiver of the statute of limitations signed by the petitioner was not exacted under duress, despite the threat of the Commissioner of Internal Revenue that he would collect $75,141.86 admittedly not due from the partnership of McDonnell & Truda, and which was outlawed, unless the said waiver was signed by the petitioner.

(3) That the sending by the Commissioner of Internal Revenue by ordinary mail of a letter advising of his action on petitioner's protest against the proposed additional tax for 1917 was a compliance with the provision of the statute requiring the sending of a notice of deficiency by registered mail. This despite the fact that the said ordinary mail letter did not state it was

a notice of deficiency or put the petitioner on notice that it was the Commissioner's final action.

Reasons Relied On for the Allowance of the Writ.

The writ of certiorari in this case should be allowed for the following reasons:

1. *The Decision is in Direct Conflict With a Decision of the Circuit Court of Appeals for the Second Circuit.*

The decision of the Court of Claims in this case is directly in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Co.* v. *Commissioner*, 55 Fed. (2d) 893, on the question of the validity of waivers of the statute of limitations executed after June 2, 1924, and prior to February 26, 1926, in cases where the statute of limitations had expired prior to June 2, 1924. That the Court of Claims fully recognized this conflict is shown by the lengthy discussion of the Uncasville case in the court's opinion (R. 13, 14).

In the Uncasville case certiorari was sought on other points and denied, 286 U. S. 545.

That the Court of Appeals is correct and the Court of Claims is in error is shown by the language of the statute. Section 278(*c*) of the Revenue Act of 1924 provides for the assessment and collection of a tax after the expiration of the statute of limitations:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be as-

> sessed at any time prior to the expiration of the period agreed upon."

Subsection (*e*) of Section 278 then specifically provides that if the limitation had expired prior to the enactment of the Act it could not be extended. Subsection (*e*) states:

> "This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Because of the conflict above mentioned the writ should be granted in order that the law may be settled.

2. *The Waiver was Executed Under Duress and the Decision on This Point is in Conflict with Board of Tax Appeals Decisions.*

The waiver executed by the petitioner was exacted by duress. In this case the Commissioner of Internal Revenue admitted that the additional tax due from the partnership was $24,863.28 and not $100,005.14 which had been assessed. In addition the entire tax against the partnership was outlawed. The Commissioner stated, however, that he would not remove this admittedly erroneous assessment unless the petitioner executed the waiver of the statute of limitations in his individual case. In other words, the partners

were threatened that an erroneous assessment of $75,-141.86 would be collected from the partnership unless the partners agreed to pay outlawed individual taxes in a smaller amount. It is established that legal duress exists where one is "* * * coerced to do the act in order to escape a greater evil." (*Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 22.)

The Board of Tax Appeals has held that duress was used where the taxpayer signed a waiver of the statute of limitations under threat that a fraud penalty would be assessed if the said waiver was not signed. *Alfred J. Diescher*, 18 B. T. A. 353. In the Diescher case the Board points out (pp. 358 and 359) that if the taxpayer had paid the tax under these circumstances it could have recovered the amount so paid in an action at law. "It would seem very strange, therefore, that a document signed under similar pressure of circumstances could be a voluntary act and more binding than the payment of money."

3. *No Registered Mail Notice of Deficiency Was Mailed Petitioner and the Decision on the Point is in Conflict with Board of Tax Appeals Decisions.*

In this case the deficiency was collected without the mailing of a registered notice of deficiency from which taxpayers have the right of appeal to the Board of Tax Appeals. Section 274(*a*) of the Revenue Act of 1926 states in part:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in

> respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (*d*) or (*f*) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final * * *."

In this case the Court of Claims makes no finding that a registered mail notice of deficiency was mailed but argues that the ordinary mail letter advising of the Commissioner's action on a protest to the additional tax met the requirement of the statute as to the registered mail notice of deficiency. Such a holding is contrary to the decisions of the Board of Tax Appeals. *J. H. Reese,* 15 B. T. A. 1261; *Dimwiddie Lampton,* 17 B. T. A. 649; *G. H. Connell,* 15 B. T. A. 1309.

As the statute now in force retains the requirement that the Commissioner send notices of deficiency by registered mail, taxpayers should be advised by this Court whether the requirement of the statute can be ignored by the Commissioner.

Conclusion.

In view of the foregoing the writ as prayed for should be granted.

PETER L. McDONNELL,
By ROBERT ASH,
Attorney for Petitioner.

(2415)

FILE COPY

Office Supreme Court, U. S.
FILED
AUG 31 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 331

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 331

DOMINIC A. TRUDA, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In support of his petition for a writ of certiorari to the Court of Claims the petitioner respectfully shows:

Statement of the Matter Involved.

March 29, 1918, the petitioner filed his income tax return for 1917. On April 1, 1918, the partnership, McDonnell & Truda, of which petitioner was a member, filed a return of income on Government Form 1065.

March 18, 1923, or thirteen days prior to the running of the statute of limitations for the assessment and collection of additional tax for 1917, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership McDonnell & Truda for the year 1917 in the amount of $100,005.14. The partnership filed a claim in abatement protesting the additional tax.

From the above it is apparent that the jeopardy assessment of $100,005.14 made against the partnership could not lawfully be collected after April 1, 1924. See *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Russell* v. *United States*, 278 U. S. 181.

November 30, 1925, which was after the expiration of the statute of limitations as stated above, the Commissioner of Internal Revenue wrote the petitioner and his partner, Peter L. McDonnell, that the jeopardy assessment of $100,005.14 made against the partnership was in error and that there was due but $24,863.28 additional tax instead of $100,005.14 (R. 8). The Commissioner stated, however, that he would not reduce the said admittedly erroneous jeopardy assessment of $100,005.14 against the partnership to $24,863.28 unless the petitioner, against whom the statute of limitations had admittedly run, would sign a waiver of the statute of limitations and agree to pay an outlawed tax of $5,485.18 (R. 9, 10). A similar demand was made of the petitioner's partner.

Because of the threat of the Commissioner of Internal Revenue that he would proceed with the collection of the admittedly erroneous $75,141.86 portion of

the above mentioned jeopardy assessment, and which was then barred, the petitioner, on February 23, 1926, executed a waiver of the statute of limitations for 1917 with reference to his personal liability.

As will be noted, the waiver signed by the petitioner was executed after the enactment of the Revenue Act of 1924 (June 2, 1924), and before the enactment of the Revenue Act of 1926 (February 26, 1926). Section 278 of the 1924 Act provided that the statute of limitations could be waived, but Section 278(*e*) specifically provided that this section did not authorize the collection of any tax which was barred prior to its enactment. The United States Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Co.* v. *Commissioner*, 55 Fed. (2d) 893, has, in direct conflict with the case at bar, held that collection could not legally be made under such circumstances. (See discussion R. 13, 14, in No. 330, *Peter L. McDonnell* v. *United States*, which controls this case. Petition for certiorari in the McDonnell case is being submitted at the same time as the petition in this case.)

Despite the provisions of the statute above stated the petitioner was compelled to pay and did pay on August 13, 1926, an additional tax of $5,485.18, plus interest of $128.64.

Basis of Court of Claims Decision.

The Court of Claims decided in favor of the United States, holding:

(1) That the Circuit Court of Appeals for the Second Circuit was in error in its decision in *Uncasville*

Manufacturing Co. v. *Commissioner*, 55 Fed. (2d) 893, wherein the Circuit Court held that where the statute of limitations expired prior to June 2, 1924, the statute does not permit the execution of valid waivers of the statute of limitations between that date and February 26, 1926, the date of the passage of the Revenue Act of 1926.

(2) That the waiver of the statute of limitations signed by the petitioner was not exacted under duress, despite the threat of the Commissioner of Internal Revenue that he would collect $75,141.86 admittedly not due from the partnership of McDonnell & Truda and which was outlawed unless the said waiver was signed by the petitioner.

Reasons Relied On for the Allowance of the Writ.

The writ of certiorari in this case should be allowed for the following reasons:

1. *The decision is in direct conflict with a decision of the Circuit Court of Appeals for the Second Circuit.*

The decision of the Court of Claims in this case is directly in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Co.* v. *Commissioner*, 55 Fed. (2d) 893, on the question of the validity of waivers of the statute of limitations executed after June 2, 1924, and prior to February 26, 1926, in cases where the statute of limitations had expired prior to June 2, 1924. That the Court of Claims fully recog-

nized this conflict is shown by the lengthy discussion of the Uncasville case in the Court's opinion (R. 13, 14, in No. 330, *Peter L. McDonnell* v. *United States*).

In the Uncasville case certiorari was sought on other points and denied, 286 U. S. 545.

That the Court of Appeals is correct and the Court of Claims is in error is shown by the language of the statute. Section 278(*c*) of the Revenue Act of 1924 provides for the assessment and collection of a tax after the expiration of the statute of limitations:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Subsection (*e*) of Section 278 then specifically provides that if the limitation had expired prior to the enactment of the Act it could not be extended. Subsection (*e*) states:

> "This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Because of the conflict above mentioned the writ should be granted in order that the law may be settled.

2. *The waiver was executed under duress and the decision on this point is in conflict with Board of Tax Appeals decisions.*

The waiver executed by the petitioner was exacted by duress. In this case the Commissioner of Internal Revenue admitted that the additional tax due from the partnership was $24,863.28 and not $100,005.14 which had been assessed. In addition the entire tax against the partnership was outlawed. The Commissioner stated, however, that he would not remove this admittedly erroneous assessment unless the petitioner executed the waiver of the statute of limitations in his individual case. In other words, the partners were threatened that an erroneous assessment of $75,141.86 would be collected from the partnership unless the partners agreed to pay outlawed individual taxes in a smaller amount. It is established that legal duress exists where one is "* * * coerced to do the act in order to escape a greater evil." (*Robinson* v. *Frank Brothers Co.*, 132 U. S. 17, 22.)

The Board of Tax Appeals has held that duress was used where the taxpayer signed a waiver of the statute of limitations under threat that a fraud penalty would be assessed if the said waiver was not signed. *Alfred J. Diescher*, 18 B. T. A. 353. In the Diescher case the Board points out (pp. 358 and 359) that if the taxpayer had paid the tax under these circumstances it could have recovered the amount so paid in an action at law. "It would seem very strange, therefore, that a document signed under similar pressure of circum-

stances could be a voluntary act and more binding than the payment of money."

Conclusion.

In view of the foregoing the writ as prayed for should be granted.

DOMINIC A. TRUDA,
By ROBERT ASH,
Attorney for Petitioner.

(2416)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 330 and 331.

PETER L. McDONNELL, *Petitioner,*

vs.

THE UNITED STATES.

DOMINIC A. TRUDA, *Petitioner,*

vs.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONERS.

ROBERT ASH,
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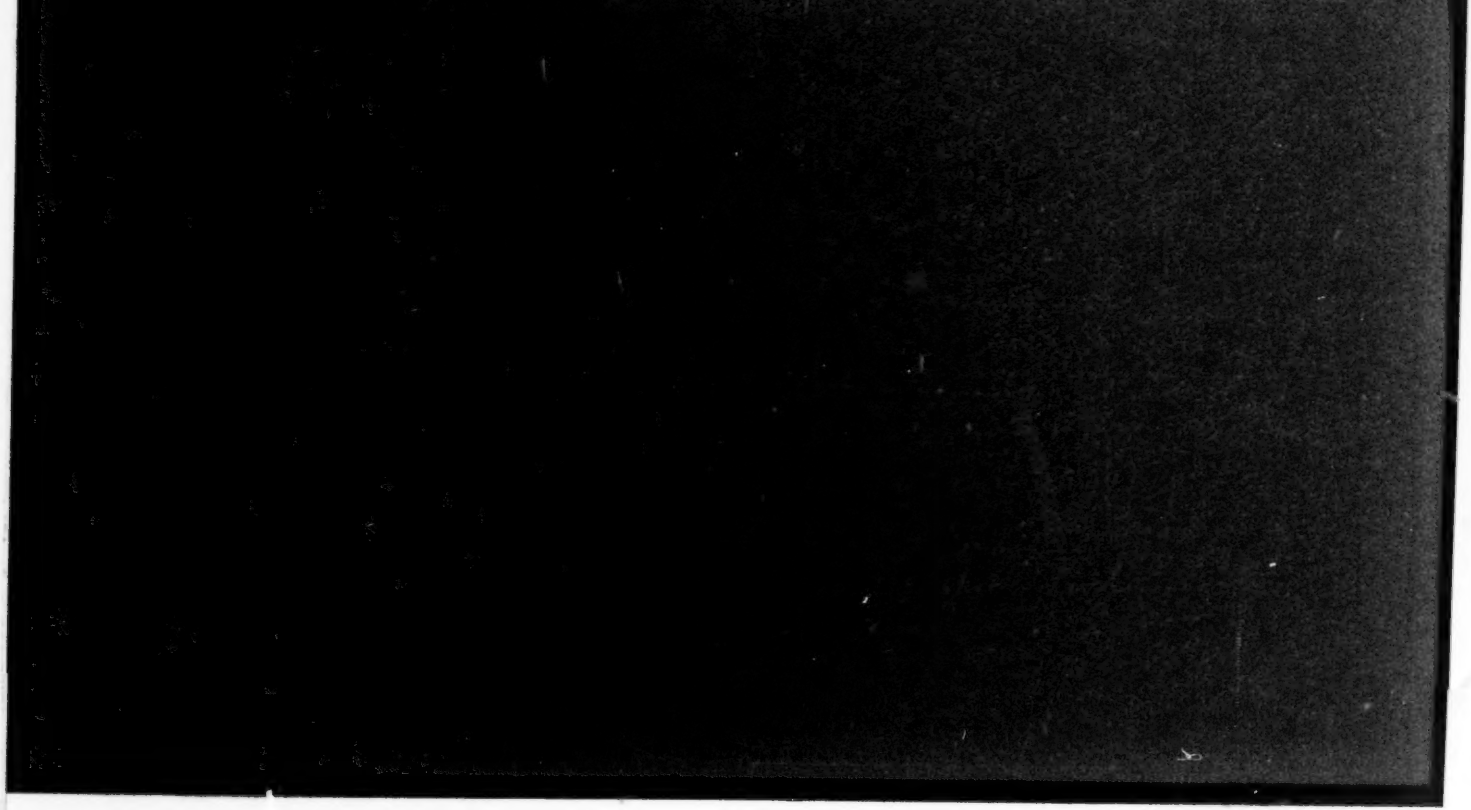

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

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PETER L. MCDONNELL, *Petitioner*,

vs.

THE UNITED STATES.

DOMINIC A. TRUDA, *Petitioner*,

vs.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONERS.

OPINION BELOW.

The opinion of the Court of Claims in the McDonnell case (R. 6-16) is reported in 59 Fed. (2d) 290. As yet the memorandum opinion in the Truda case (Truda R. 6-11), which was decided on the authority of the McDonnell case, is not reported in the Federal Reporter. It is reported, however, at ¶1309 of the Prentice-Hall 1932 Federal Tax Service.

JURISDICTION.

The judgment of the Court of Claims was entered in each case May 31, 1932. The petitions for certiorari were filed August 31, 1932, and were granted October 24, 1932, "limited to the question of the validity of the waiver under Section 278 (e) of the Revenue Act of 1924." Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code as amended by Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED.

The question presented is limited by the order allowing certiorari to the following:

> Does Section 278(e) of the Revenue Act of 1924 render invalid waivers executed after the enactment of the Revenue Act of 1924 with respect to taxes the assessment and collection of which had become barred prior to the enactment of the Act.

STATUTES AND REGULATIONS INVOLVED.

Section 277 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299 (U. S. C. Title, 26, Sec. 1057), provides:

> Sec. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court

for the collection of such taxes shall be begun after the expiration of such period.

Section 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300 (U. S. C., Title 26, Secs. 1058, 1059, 1060, 1061, 1062), provides:

> Sec. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Article 1271 of Regulations 65 provides in part:

> Art. 1271. Period of limitation upon assessments of tax.—The amount of tax imposed by the Revenue Act of 1921 and by such Act as amended for the taxable years 1921, 1922, and 1923, and the amount of tax imposed by the Revenue Act of 1924 for the taxable year 1924, or succeeding taxable years, must be assessed within four years after the return was filed, and the amount of tax imposed by the Act of August 5, 1909, the Act of October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, must be assessed within five years after the return was filed, with the following exceptions:
>
> * * * * * * * * *
>
> (6) If the Commissioner and the taxpayer consent in writing to the assessment of the tax after the expiration of the four-year period or five-year period prescribed by section 277(a) of the statute as the period in which the assessment must be made, the tax may be assessed at any time prior to the expiration of the period agreed upon.

Article 1273 of Regulations 65 provides in part:

> Art. 1273. Cases where period of limitation on assessment and collection of tax under Revenue Act of 1924 is not retroactive.—Subdivision (e) of section 278 of the statute provides that no provision of that section shall authorize an assessment of any tax or its collection by distraint or by proceeding in court if such assessment, distraint, or proceeding in court was barred by the period of limitation in existence at the time of the enactment of this Act. * * *

STATEMENT OF THE CASE.

March 29, 1918, and April 1, 1918, Truda and McDonnell, respectively, filed their individual income tax returns for 1917. April 1, 1918, the partnership McDonnell & Truda, which was composed of the two petitioners herein, filed its

partnership return for 1917 on Government Form 1065 (McDonnell R. 7; Truda R. 6).

March 18, 1923, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership in the amount of $100,005.14. A claim in abatement protesting this jeopardy assessment was filed.

November 30, 1925, the Commissioner of Internal Revenue, wrote the petitioners stating that a consideration of the appeal of the partnership for assessment under Section 210 ("special assessment") of the Revenue Act of 1917 indicated that there was an overassessment against the partnership of $75,141.86. "However, a reduction of the excess-profits tax liability of the partnership necessitates a corresponding increase in the distributive interests of the partners and a corresponding increase in the taxable net income, resulting in an additional tax liability for each partner." McDonnell's additional tax liability was stated as $6,877.62 and Truda's $5,485.18 (McDonnell R. 7; Truda R. 7). The letters then stated:

> "Inasmuch as the limitation of time within which to assess the $6,877.62 ($5,485.18 in Truda's case) has expired, you are requested to execute and return to this office the enclosed form of waiver, to facilitate the adjustments of the partnership's overassessment and your resulting additional tax liability." (McDonnell R. 7; Truda R. 7.)

December 17, 1925, the Commissioner mailed the following letter to the partnership:

> "Receipt is acknowledged of your letter dated December 10, 1925, wherein you state that a letter has not as yet been received by you showing the amount of income and excess profits tax finally determined to be due for the year 1917, and requesting that this letter be forwarded before compliance with the request of this office in bureau letters dated November 30, 1925,

that waivers be furnished for the partners, Peter L. McDonnell and Dominic A. Truda.

"In the letters to Peter L. McDonnell and Dominic A. Truda mentioned above, they were advised that an audit of the partnership of McDonnell and Truda under section 210 of the revenue act of 1917 resulted in the determination of an overassessment of $75,141.86.

"The audit of the partnership can not be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment." (McDonnell R. 8; Truda R. 7.)

February 26, 1926, the Commissioner, not having had replies from the petitioners to his letters of November 30, 1925, wrote the petitioners. McDonnell's letter, which is identical with Truda's except as to the amount of tax, is:

"Reference is made to bureau letter, dated November 30, 1925, wherein you were advised that an audit of your income-tax return for the year 1917 resulted in the determination of a deficiency in tax of $6,877.62 due to assessment under the provisions of section 210 of the revenue act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was inclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Dominic A. Truda.

"You are, therefore, requested to execute and return to this office the inclosed form of waiver within fifteen days from the date of this letter in order that adjustment of the partnership's overassessment and your resulting additional-tax liability may be made."

February 23, 1926, the petitioners and the Commissioner executed consents in writing to the assessment and collection of any tax determined to be due by the Commissioner for 1917 beyond the period of limitation provided in the statute. The consents waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts, to the extent of $6,877.62 (in Truda's case $5,485.18) conditioned upon the proposed additional assessment against McDonnell & Truda for the year 1917 of excess-profits tax, the sum being fixed at $24,863.28." (McDonnell R. 9; Truda R. 8.)

May 22, 1926, the Commissioner mailed to the partnership a letter advising that the additional assessment against the partnership had been reduced from $100,005.14 to $24,863.28. (McDonnell R. 9. Truda R. 9.)

May 22, 1926, the Commissioner notified the petitioners by what is commonly known as "thirty-day letters" of the proposed assessment of deficiencies for 1917 of $6,877.66 in the case of McDonnell and $5,485.18 in the case of Truda. (McDonnell R. 10; Truda R. 9.)

McDonnell protested the amount of the proposed additional tax and on July 12, 1926, the Commissioner acknowledged the said protest and reduced the amount of the additional tax to $4,386.15. (McDonnell R. 11.)

July 17, 1926, the Commissioner made an additional assessment of tax against Truda of $5,485.18 plus interest of $128.64 which was paid August 13, 1926. (Truda R. 10.)

October 9, 1926, the Commissioner made an assessment of additional tax against McDonnell of $4,386.15. This amount, together with interest thereon, aggregating $4,549.03, was paid October 23, 1926. (McDonnell R. 11.)

December 24, 1928, Truda filed a claim for refund of $5,613.82 on the ground that the waiver of the statute of

...tions theretofore executed by him was invalid and that the amount claimed was collected after the running of the statute of limitations. The claim was rejected by the Commissioner July 25, 1929. (Truda R. 10.) Suit was filed in the Court of Claims January 22, 1930. (Truda R. 1.)

McDonnell filed two claims for refund on December 27, 1928, and May 31, 1929, respectively, alleging, in addition to another ground, that the consent filed by him waiving the statute of limitations was invalid and that the tax was, therefore, collected after the running of the applicable period of limitations. The claims for refund were rejected March 6, 1929, and July 25, 1929, respectively. (McDonnell R. 11.) Suit was filed in the Court of Claims November 4, 1929. (McDonnell R. 1.)

ARGUMENT.

This case presents an interesting question of statutory construction but, as compared with most of the tax cases considered by this Court, is relatively unimportant in its effect upon the public revenue or any large group of taxpayers. The memorandum filed in behalf of the Government when the petition for certiorari was pending states (p. 6):

> "Although the question is narrow in its scope, and its decision by this Court will control only cases where an assessment was barred on the date of the enactment of the Revenue Act of 1924, and where a waiver consenting to a later assessment and collection of the tax was given after that date and before the date of the enactment of the Revenue Act of 1926, we are advised by the Bureau of Internal Revenue that there are 12 cases of this character pending, involving approximately $625,000 in refunds."

The effective date of the Revenue Act of 1924 was June 2, 1924, and the effective date of Revenue Act of 1926 was February 26, 1926.

It is admitted by the Government that the taxes here involved were barred by the five-year statute of limitation prior to the effective date of the Revenue Act of 1924. (See Commissioner's letters of November 30, 1925, McDonnell R. 7; Truda R. 7.)

The court below in disposing of this case draws certain conclusions which are erroneous. In speaking of this Court's decision in *Aiken v. Burnet,* 282 U. S. 277, the opinion states (R. 13-14):

> "The court held that the taxpayer had sufficient authority, in the absence of any statute, to execute a valid waiver, and that the Commissioner, under the same circumstances, had authority to accept such waiver and bind the Government."

The authority for the waivers in the Aiken case was based on the broad authority of the Commissioner to promulgate regulations which have the force and effect of law. "In the absence of any statute" the said waivers were, of course, valid under the said regulations. Beginning with the 1921 Act there was, however, a statute governing waivers, so thereafter the authority for waivers was found in the statute and not in the regulations. Therefore if there was no statutory authority for the waivers here involved, they were invalid.

> "* * * When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc. R. R. Co. vs. Reid, 13 Wall. 269, 270; Scott vs. Ford, 52 Ore. 288, 296." (*Botany Worsted Mills vs. United States,* 278 U. S. 282, 289.)

The Court of Claims in the case at bar proceeds (R. 14):

> "Again in Brown & Sons Lumber Co. v. Burnet, *supra,* the court infers that the last of the three waivers involved in that case would have been sufficient standing alone. A foot-note in the opinion states: 'In-

> asmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection as was done in the lower court. See 38 F. (2d) 428.' "

It is apparent from the foregoing that the Court of Claims has misunderstood the language in the Brown case. The courts there disregarded the first waiver and not the first and second waivers as the Court of Claims states. The second waiver was filed December 10, 1923, so the limitation had not run on June 2, 1924, when the Revenue Act of 1924 became effective. Consequently the waiver of October 25, 1924, was proper and did not attempt to revive limitations which had run prior to June 2, 1924.

The Court of Claims then states (R. 14):

> "In the Uncasville Mfg. Company case, the Court construed section 278(c) of the Revenue Act of 1924 as a prohibition upon the giving of a waiver by a taxpayer and the acceptance thereof by the commissioner. We are unable to find any provision in the 1924 revenue act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitations, nor do we find anything in such act prohibiting the commissioner's acceptance of such waiver."

The prohibition here involved is contained in Section 277 which prohibits assessment of 1917 taxes later than five years from the date the return was filed "except as provided in section 278 * * *." Therefore, in order to lawfully assess after the five years it must be shown that the case comes within the exceptions specified. In other words, the prohibition relied on is not with reference to waivers, but with reference to assessment after five years.

In the case at bar, however, the Court of Claims rests its opinion primarily on the following (R. 14-15):

> "* * * In Burnet v. Chicago Railway Equipment Co., supra in footnote 5, page 300, to the statement in the opinion that 'We need not determine whether respondent is correct in assuming that section 278(e) qualifies section 278(c) in respect to waivers on assessment of taxes barred prior to June 2, 1924,' it is stated that 'Subdivision (e) can not be said to qualify every other subdivision in section 278. Nothing indicates an intention to have it limit the effect of section 278(a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * *Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers.* (Italics ours.)' We conclude, therefore, that the revenue act of 1924 does not (fols. 17 & 18) preclude a taxpayer from waiving the benefit of the statute of limitation, and that a waiver given after the enactment of the revenue act of 1924, in a case where the statutory limitation has expired prior thereto, and before February 26, 1926, is valid."

It is submitted that with the exception of the dicta appearing in the footnote in the Chicago Railway Equipment Company case, the case of *Pacific Coast Steel Co. vs. McLaughlin* (C. C. A. 9) 61 F. (2d) 73, now pending before this Court (No. 518) on petition for writ of certiorari, which followed the case at bar, is the only court expression to the effect that section 278(e) does not qualify sections 278(c) and (d).

Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346, holds that subsection (e) qualifies subsection (d). At page 351 the Court states:

> "Later legislation assumes that the limitation under consideration applies to distraints as well as to suits. See section 278(d) and (e), Revenue Act of 1924, c. 234, 43 Stat. 253, 300. Section 278(d) provides that, where assessment is made within the prescribed time, the tax may be collected by distraint or by a proceeding in court within six years after the assessment. And section 278(e) provides:

> " 'This section shall not authorize the assessment of a tax or the collection thereof by *distraint* or by a proceeding in court if at the time of the enactment of this Act such assessment, *distraint*, or proceeding was barred by the period of limitation then in existence.'
>
> "This plainly implies that distraint might be barred. * * * "

Thereafter the Court again had occasion to discuss the effect of Section 278(e) on Subsection (d). In *Russell v. U. S.*, 278 U. S. 181, suit was filed by the United States against Russell in 1925, more than five years after a return for 1918 was filed, although assessment of the tax involved had been made within the five-year statutory period. The Court states (p. 188):

> "Paragraph (e) (2) of section 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive section 278 of any possible application to cases where assessment had been made prior to June 2, 1924."

It is submitted that if in the Lighterage and Russell cases Section 278(e) qualified Section 278(d) there is no possible reason why in this case the same Section 278(e) should not qualify Section 278(e).

Still later the Court again passed upon the effect of Section 278(e). In *Florsheim Bros. Drygoods Co. v. U. S.*, 280 U. S. 453, the assessment was made after the passage of the 1924 Act within the period of limitations as extended by waivers under Section 250(d) of the 1921 Act. The Court in discussing limitations in the 1926 Act states (p. 467-8):

"* * * The situations intended to be excluded from the limitations prescribed were carefully specified in section 278(e): (1) assessments or collections already barred before the passage of that Act and (2) assessment made and proceedings begun prior to that time. * * * Compare *Russell v. U. S.*, 278 U. S. 181."

Other courts likewise have felt that Section 278(e) qualified Subsection (d).

In *U. S. v. Whyel*, 28 F. (2d) 30, the Court was confronted with a situation similar to that presented in *Russell v. U. S.*, 278 U. S. 181, and reached the same conclusion as this Court later reached in the Russell case. The Court states (p. 32-33):

"A. W. Gregg, Esq., general counsel of the Bureau of Internal Revenue and legislative expert, who directed the drafting of this act, in explaining the purpose of section 278 to the Senate finance committee, said that it was 'to keep this section from having any retroactive effect or to apply to things happening before its passage.' He further said that its purpose was 'to prevent the giving of any retroactive effect to the provisions of this act. The taxes under prior acts stand on their own footing, and this applies only after the passage of this act.'

"The Senate finance committee, in its official publication entitled 'Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715, and the Reasons Therefor, March 5, 1924,' at page 27, said with reference to section 278(e): 'This subdivision prevents the extension of this section to assessments or proceedings already begun under the existing law. * * *'"

U. S. v. Board, 14 F. (2d) 459, specifically holds that Section 278(e) qualifies Section 278(d) and that where collection was barred before June 2, 1924, the six-year period for collection does not apply.

"Although the additiontal tax was assessed within the five-year period, the time within which the tax could

be collected by distraint or proceedings in court having expired long before June 2, 1924, the effective date of the Revenue Act of 1924, such collection would not be authorized by the provisions of Section 278(d) of that Act since subdivision (e) of the section provides that the section shall not authorize a collection by proceedings in court if, at the time of the enactment of the act, such proceedings were barred by the period of limitation then in existence. * * * (*Gove v. Nichols*, 23 F. (2d) 856, 857.)"

The Commissioner also reached the same conclusion in G. C. M. 4253, C. B. Dec. 1928, p. 204.

In addition to the foregoing it seems that the statement in the footnote of the Chicago Railway Equipment Company case previously referred to, and the argument of the Court of Claims in this case is completely answered by Judge L. Hand in *Uncasville Mfg. Co. v. Commissioner*, 55 F. (2d) 893, as follows (pp. 895, 896):

"Confessedly, had the time for assessment expired after June 2, 1924, the waivers would have been good, though executed after the expiry of the time to assess or collect. Burnet v. Railway Equipment Co., 282 U. S. 295, 51 S. Ct. 137, 75 L. Ed. 349. However, section 278(e) of the Act of 1924 declared that the section as a whole should not allow the assessment or collection of a tax, barred by existing limitations on June 2, 1924. Subdivision (c) of section 278 is necessary to the assessments because they depended upon the waivers, and there was no other law regulating waivers in effect after June 2, 1924. Thus if subdivision (e) confines subdivision (c) to cases where the assessment was not barred on June 2, 1924, the company is right. In spite of some intimations in Burnet v. Chicago Railway Equipment Company, which, however, expressly reserved the point, we think that an analysis of section 278 as a whole does not admit of any other construction. As some confirmation we may note that in Russell v. U. S., 278 U. S. 181, 49 S. Ct. 121, 73 L. Ed. 255, subdivision (d), which concerns not assessment but collection,

was confined by the second part of subdivision (e) to assessments made after June 2, 1924.

"Subdivision (a) extends indefinitely the time for all assessments where the return was fraudulent, or there was none. This had already been done by second proviso of section 250(d) of the Act of 1921, and section 250(d) of 1918 had the same provision for fraudulent returns, though none for a failure to make any. Before 1918 there was a limit of three years for fraudulent returns and no returns. Section 2, Subdivision E, Act of 1913; section 9(a) Act of 1916. Subdivision (e) of section 278 of the Act of 1924 could not therefore affect subdivision (a), and so it was observed in Burnet v. Chicago Railway Equipment Co., because such assessment and collections were not barred on June 2, 1924.

"Subdivision (b) of section 278 refers to deductions taken in amortization of war investments, and extends indefinitely the time finally to assess deficiencies, because of these. This was already the law under the third proviso of section 250(d) of the Act of 1921, though there had been a limit in the Act of 1918 (§214 (a) (9), §234(a) (8)), as to tentative deficiences, which indeed remained in the identical sections of the Act of 1921. Thus the final assessment of such deductions had already been extended indefinitely, and subdivision (e) so far as it touched assessments at all did not apply to subdivision (b).

"Subdivision (d) did not concern assessments but collections, and for that matter has been confined to assessments made after June 2, 1924, as we have said. Therefore, as subdivision (e) limits the force of the section at large not only as to collection, but as to assessment, it must control assessments made under waivers, for there is no other assessment mentioned in the section on which it can operate. Unless then we construe it to mean that a waiver shall not revive a tax if the period of assessment has expired on June 2, 1924, we leave it in the air, qua assessments; it becomes brutum fulmen. This of course cannot be, and we therefore hold that the waivers did not revive the taxes."

The Board of Tax Appeals in the Uncasville case apparently did not consider or decide the effect of Section 278(e) upon Section 278(d). (See *Uncasville Mfg. Co.*, 19 B. T. A. 920.)

Unless Section 278(e) is given the construction just mentioned the entire subsection is meaningless.

The "waiver" cases previously decided by this Court do not control the present case. They all involve questions arising under other statutes and presenting entirely different facts. They should, however, be mentioned.

In *Stange v. U. S.*, 282 U. S. 270, the waiver involved was executed under the 1921 Act. It was held to be valid even though executed more than five years after the filing of the return; that although purporting to cover only assessments it was operative to extend the time for collection; that it was not a contract but rather a unilateral waiver of a defense.

Aiken v. Burnet, 282 U. S. 277, involved a waiver executed prior to the enactment of the 1921 Act. It held that a waiver was valid even though executed prior to the enactment of any statutory authority for the giving of waivers; that it waived the limitation prescribed in the subsequently enacted 1921 Act; that it covered war-profits tax as well as income tax; that although purporting to cover only assessment it was operative to extend the time for collection.

W. P. Brown & Sons Lumber Co. v. Burnet, 282 U. S. 283, added to the rules prescribed by the Stange and Aiken cases the rule that the extension of the period for collection until after a final determination by the Board of Tax Appeals in a case appealed to it is contemplated by Section 283(f) of the 1926 Act although the period for collection as extended by waivers expired after the appeal was taken.

Burnet v. Chicago Railway Equipment Co., 282 U. S. 295, has already been discussed and adds nothing to the law on waivers which is applicable here.

LEGISLATIVE HISTORY OF WAIVER PROVISIONS.

The first provision with reference to waiving the statute of limitations to appear in the revenue statutes was in Section 250(d) of the Revenue Act of 1921 wherein the period for assessment was set out and immediately thereafter appeared the following:

> "* * * unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; * * *."

When the Revenue Act of 1924 was before Congress both the Ways and Means Committee Report (68th Congress, 1st Session, Report No. 179, p. 63) and the Finance Committee Report (68th Congress, 1st Session, Report No. 398, p. 32), stated with reference to Section 278(c):

> "A substantially similar provision is included in section 250(d) of the existing law."

Section 278(e) as it appeared in the House Bill (H. R. 6715, 67th Congress) stated:

> "This section shall not (1) authorize the assessment of a tax or the beginning of a proceeding in court for the collection of a tax if at the time of the enactment of this act such assessment or proceeding was barred by the period of limitation then in existence, * * *."

With reference to this section the Ways and Means Committee Report states (p. 64):

> "This subdivision prevents the extension of the section to assessments or proceedings already barred by the existing law, or to assessments or proceedings already begun under the existing law."

The Finance Committee changed the language of subsection (c) to read as it appears in the law. The Committee Report (p. 32) in discussing the change states:

> "This subdivision has been rewritten to make it clear that the section does not extend to assessments or distraint proceedings already barred by the existing law, or to assessments or distraint proceedings already begun under the existing law."

In order to understand Congressional policy on this question subsequent enactments may be helpful.

Section 278(c) of the Revenue Act of 1926 as contained in the House Bill (H. R. 1, 69th Congress) read:

> "This section shall not affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act, nor shall it authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence * * *"

As reported to the Senate and enacted into law Section 278(c) read as follows:

> "This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, * * *"

The only comment on the change is the statement of the Managers on the Part of the House at p. 42 of the Conference Report (69th Congress, 1st Session, Report. No. 356) as follows:

> "Amendment No. 85. This amendment rewrites in more definite language, and correcting clerical mis-

takes, subdivisions (d) and (e) of section 278 of the House bill, dealing with the time within which distraint or proceeding in court may be begun after the assessment has been made. The House recedes."

As passed by the House the Revenue Act of 1928 had a provision similar to the section in the 1926 Act just quoted. The Finance Committee changed the wording and meaning, however, so Section 276(b) of the Revenue Act of 1928 reads:

"(b) Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

The Finance Committee Report (70th Congress, 1st Session, Report No. 960, p. 31) states:

"Section 276(b) of the House bill corresponds to section 278(c) of the revenue act of 1926 in so far as it provides that the commissioner and the taxpayer may extend the period for assessment of the tax for 1928 and subsequent years by an agreement in writing and that in such case the tax may be assessed at any time prior to the expiration of the period agreed upon. Section 276(b) of the House bill, however, goes somewhat further, in that it specifically provides that such a consent, usually called a 'waiver', shall be valid, even though it is executed after the commissioner's right to make the assessment has expired. In the interest of keeping cases closed after the running of the statute of limitations, the committee has stricken out the provisions of the House bill which make waivers in the case of taxes for 1928 and future years valid when they have been executed after the limitation period has expired."

Section 276(b) of the Revenue Act of 1932 provides:

> "Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

The foregoing indicates a definite legislative policy to prevent the giving of waivers in cases where the statute of limitations had run.

CONCLUSION.

Unless the enactment of Section 278(e) is to be considered as meaningless, the Court below should be reversed.

ROBERT ASH,
Attorney for Petitioner.

December, 1932.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 330 and 331.

PETER L. MCDONNELL, *Petitioner,*

vs.

THE UNITED STATES.

DOMINIC A. TRUDA, *Petitioner,*

vs.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR PETITIONERS.

The brief for the United States presents four points which this brief discusses. They are:

1. Taxing statutes containing provisions of limitation must be construed liberally in favor of the taxpayer, and not strictly construed in favor of the Government as contended in the Government's brief.

2. These taxpayers are not estopped to deny the validity of the waivers.

3. The cases are not controlled by *Aiken v. Burnet*, 282 U. S. 277; *Stange v. U. S.*, 282 U. S. 270; or *Burnet v. Chicago Railway Equipment Co.*, 282 U. S. 295.

4. The Revenue Act of 1926 does not give validity to the waivers here involved.

ARGUMENT.

I.

Taxing Statutes Containing Provisions of Limitation Must Be Construed Liberally in Favor of the Taxpayer.

The Government's brief at page 14 states:

> "Statutes limiting the rights of the Government must be strictly construed. Independent Coal & Coke Co. v. United States, 274 U. S. 640; Loewer Realty Co. v. Anderson, 31 F. (2d) 268, 269 (C. C. A. 2nd), certiorari denied, 280 U. S. 558."

The Independent Coal & Coke Co. case involves public lands and cannot possibly be construed as an authority in tax cases. In Loewer Realty Co. the Circuit Court of Appeals in dicta misstates the rule, as the Government has in its brief in this case.

In construing taxing acts this Court has consistently held that liberal construction in favor of the taxpayer applies to provisions of limitation as well as to other provisions.

In *Bowers, Collector of Internal Revenue v. New York & Albany Lighterage Co.*, 273 U. S. 346, 349, this Court, in construing Section 250(d) of the Revenue Act of 1921, a limitation statute against the government, said:

> "He [the collector] maintains that any ambiguity in the clause under consideration must be resolved in his favor. Undoubtedly the United States will not be held barred by a *general* statute of limitation unless, upon a strict construction in its favor, the United States and the claim sought to be enforced fairly may be held to be within the terms and purpose of the statute * * *. The limitation applies to petitioner [the collector] and to the claims. * * * The provision is a part of a taxing statute; *and such laws are to be interpreted liberally in favor* of the taxpayers (citing cases)." (Italics supplied.)

Later this same rule was reiterated in *U. S. v. Updike, et al.*, 281 U. S. 489, 496. The Court said:

> "In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers v. N. Y. and Albany Co., 273 U. S. 346, 349." (Italics supplied.)

In view of the foregoing it must be held that the law as announced by this Court is that the limitation provisions of taxing acts must be construed liberally in favor of the taxpayer.

II.

These Taxpayers Are Not Estopped to Deny the Validity of the Waivers.

Beginning at page 16 of the Government's brief, the argument is made that the taxpayers are estopped to deny the validity of the waivers on the theory that when they were filed the taxpayers "were seeking special relief under Section 210 of the Revenue Act of 1917 with respect to the partnership's income and profits taxes." That the taxpayers received no benefit and that the Government was not injured by the giving of the waivers is at once apparent.

Section 210 of the Revenue Act of 1917 provides:

> "That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partner-

> ships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000. * * *"

The record in these cases clearly shows (McDonnell R. 7, 8) that prior to the execution of the waivers here involved the Commissioner *had acted* under Section 210, *had determined* that invested capital could not be satisfactorily determined, and *had determined* that the partnership had been overassessed $75,141.86. As the Commissioner had made the only determination required by statute his sole remaining duty was to close the partnership case on that basis. Whether or not these taxpayers signed the waivers in their individual cases the fact would have remained that the partnership was entitled to special assessment and it had been so determined by the Commissioner.

The law is established that taxpayers do not have to exercise the initiative by "seeking" relief under Section 210 of the Revenue Act of 1917 as the Government contends was done by the instant petitioners (Government's brief p. 17) because the Commissioner acts of his own motion in those cases.

> "Under section 210 of the Act of 1917, as under section 327(a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the statute." (*United States v. Factors & Finance Co.*, No. 141, decided by this Court January 9, 1933.)

The facts surrounding the giving of the waivers were as follows: On March 18, 1923, the Commissioner assessed against the partnership an additional tax of $100,005.14 which was protested; such protest was considered by the

Commissioner who, finding the case to be one within the purview of Section 210 of the Revenue Act of 1917, determined that the partnership had been overassessed in the amount of $75,141.86, and proposed the allowance of such overassessment and the consequent reduction in the amount of the assessment made March 18, 1923 (McDonnell R. 7). The Commissioner so advised petitioners and by letters addressed to them and the partnership, under date of November 30, 1925, December 17, 1925, and February 12, 1926, imposed upon them the necessity of executing the waivers here in question as a condition to his allowance of such overassessment (McDonnell R. 7, 8).

How an estoppel can be successfully invoked against petitioners in the face of these facts is quite beyond comprehension.

When the Commissioner determined that the partnership's case was within the purview of Section 210 and proposed that the additional tax theretofore assessed against it be reduced by $75,141.86, such action, we submit, terminated the Commissioner's discretion in the matter. Thenceforth his only course was to obey the mandate of the statute and forthwith reduce and abate such assessment against the partnership *pro tanto*.

Instead of complying with the law, however, the Commissioner *demanded* that petitioners execute the waivers in question *as a condition* to his compliance with the law. He demanded that petitioners do that which was *not* required of them by law, before he would do that which *was required* of him by law; before he would make them an allowance in respect of which he enjoyed no further discretion. He demanded that they give to him what purported to be a statutory right (the waivers) to collect that which *he admitted was uncollectible*, as a condition to his formal and official abatement of that tax which *he admitted had been erroneously assessed and was not legally collectible*.

Expressing it mildly, such action on the part of the Commissioner amounted to coercion and duress, for, as this

Court has held, legal duress exists where one is "* * * coerced to do the act in order to escape a greater evil" (*Maxwell v. Griswold,* 10 Howard 242, 256).

This Court has defined estoppel in *Dickerson v. Colgrove,* 100 U. S. 578, 580:

> "* * * The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. * * *"

In the instant cases the element most essential to respondent's plea is lacking, *i. e.,* the Commissioner was not lead to do what he would not otherwise have done. The Commissioner, having determined that assessment should be under Section 210, had no alternative than to proceed under that section.

Here the petitioners neither made representations nor did they conceal material facts in order to induce the Commissioner to accept the waivers now under attack; they did not request the Commissioner to delay his collection of their individual taxes. On the contrary, they demurred for a period of three months to *his demand* that they execute the waivers and executed them at the end of that time (February 23, 1926) only in order to prevent the unjust and illegal threatened collection from the partnership of the $75,141.86 overassessment.

Still a further reason why estoppel does not exist in this case is the fact that when final action was taken in the partnership case the Commissioner was required by law (Sections 273 and 274, Revenue Act of 1926) to issue a notice of deficiency to the partnership with respect to the deficiency he sought to collect. This he did May 22, 1926 (McDonnell R. 9). The partnership, of course, had the right of appeal to the Board of Tax Appeals where the partner-

ship's case would have been adjudicated irrespective of any action on the part of the partners as individuals. The Board of Tax Appeals is empowered to pass on special assessment cases (see *Blair v. Oesterlein Machine Co.*, 275 U. S. 220).

It is submitted that respondent's plea of estoppel is not only untenable but is unconscionable and should not prevail.

III.

Case is Not Controlled by Aiken v. Burnet, 282 U. S. 277; Stange v. U. S., 282 U. S. 270; or Burnet v. Chicago Railway Equipment Co., 282 U. S. 295.

The Government in its brief argues that the three waiver cases mentioned in the headline control the cases at bar. It is obvious that such is not the fact as the three cases cited are easily distinguishable.

In the Aiken case the waiver was given before the enactment of any provision for waivers. The Court held (p. 281):

> "If authority was needed for the acceptance of such waivers, it may be found in the general broad administrative provisions of the respective Acts" citing the 1917 and 1918 Acts.

Beginning with the 1921 Act the taxing statutes have provided for the granting of waivers so the authority for waivers has since then been derived from the specific authority in the statute rather than from the general administrative provisions. "*Expressio unius est exclusio alterius.*"

The Stange case held that a waiver was valid even though executed after the expiration of the period of limitation. The waiver in the Stange case, however, was executed under the 1921 Act which contained no limitation on the assessment or collection of taxes barred prior to the enactment of the Act.

The Chicago Railway Equipment Co. case is not applicable because (p. 299):

> "In the case at bar, the assessment would not have been barred until June 16, 1924, five years from the date of the return, and after the enactment of the 1924 Act, so that §278(e) is wholly inapplicable."

IV.

The Revenue Act of 1926 Did Not Give Validity to the Waivers Here Involved.

The Government's brief states (p. 15):

> "All doubt as to the validity of the waiver under section 278 of the Revenue Act of 1924 is removed by section 278 of the Revenue Act of 1926."

because Section 278 of the 1926 Act provides that it shall not authorize assessment of a tax barred at the time of the enactment of the Act

> "unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, * * *."

It is submitted that in the absence of more specific language than that used in the 1926 Act it must be presumed that Section 278 of that Act referred only to waivers which were legally effective when executed.

> "When it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past." (*White v. U. S.*, 191 U. S. 545, 552.)

See also *Shwab v. Doyle*, 258 U. S. 529, 534; *U. S. v. Magnolia Petroleum Co.*, 276 U. S. 160, 162; *Russell v. U. S.*, 278 U. S. 181, 187.

If the taxpayers' major premise is correct, that is, that the waivers were invalid when given, it must necessarily follow that when the 1926 Act was enacted the tax liability was barred. That meant that the liability was extinguished.

> "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability * * *." (Section 1106(a), Revenue Act of 1926.)

The taxes were collected while the 1926 Act was in effect (McDonnell R. 11, Truda R. 10). It is true that Section 612 of the Revenue Act of 1928 repealed Section 1106 of the 1926 Act as of the date of its enactment. On this point the Circuit Court of Appeals for the First Circuit in *Commissioner of Internal Revenue v. Northern Coal Co.* (No. 2716, decided January 3, 1933, and not yet reported) held:

> "The crux of this case, therefore, is the effect of Sec. 612 of the Act of 1928. While it repealed Sec. 1106 of the Act of 1926 as of February 26, 1926, did it thereby revive a tax liability which by Sec. 1106 had already been extinguished, and, if so, was the period for assessment extended by the waiver filed April 12, 1927?
>
> "The Board following its previous decisions, and what is understood to be the rule in the Circuit Court of Appeals, *Steiner Mfg. Co.*, 18 B. T. A. 740; *United States Refractories Corporation*, 23 B. T. A. 872; *Knight-Campbell Music Co.*, 23 B. T. A. 1234; *United States v. John Barth Company*, 27 Fed. (2d) 782; *Dobbins v. Commissioner*, 31 Fed. (2d) 935, held that the repeal of Sec. 1106 did not revive the liability and the waiver of April 12, 1927, was of no effect. Also see *Griffiths v. Commissioner*, 50 Fed. (2d) 782.
>
> * * * * * * * * *
>
> "In view, therefore, of the provisions of Secs. 607 and 609, and also of Sec. 322(c)(3) of the 1928 Act,

> and the apparent purpose of Congress in the recent Revenue Acts to speed up the determination of tax liability and the collection of taxes, we think the repeal of Sec. 1106 of the 1926 Act by Sec. 612 of the 1928 Act, following in order as it does the five preceding sections, which it is agreed were a substitute for Sec. 1106, did not and was not intended to revive a liability for the taxes of prior years, where they had been extinguished under Sec. 1106, nor to give validity to waivers filed after all liability for such taxes had been discharged,—since Congress plainly indicated by Sec. 506 of the same Act that it did not favor the continuation of the practice of filing waivers after the period of limitation had once expired, * * *"

In *Russell v. United States*, 278 U. S. 181, the identical argument was made as is made in this case. The Court states (p. 188):

> "The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of 1926 cannot authorize construction of the earlier one not consonant with the language there employed."

It is submitted that the waivers in the instant cases must stand or fall pursuant to the provisions of the law in effect when they were executed, the 1924 Act, and cannot depend upon the 1926 Act for their validity.

In addition to the foregoing the orders granting certiorari in these cases were "limited to the question of the validity of the waiver under Sec. 278(c) of the Revenue Act of 1924." Because of this limitation there is no question before the Court with reference to the effect of the 1926 Act, and it cannot properly be discussed.

Robert Ash,
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January, 1933.

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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1932

PETER L. MCDONNELL, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 11–16) is reported in 59 F. (2d) 290.

JURISDICTION

The judgment of the court below was entered May 31, 1932. (R. 16.) The petition for a writ of certiorari was filed August 31, 1932. (R. 16.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 278 (e) of the Revenue Act of 1924 renders invalid waivers executed after the enactment of the Act with respect to taxes the assessment and collection of which had become barred prior to the effective date of the Act.

2. Whether a waiver of the statute of limitations applicable to assessment and collection of individual income tax, executed by a member of a partnership for the purpose of obtaining special assessment of the partnership's excess-profits tax, was invalid as having been executed under duress.

3. Whether an assessment in 1926 of additional income tax for the year 1917 was void under Section 274 (a) of the Revenue Act of 1926 by reason of the Commissioner's failure to notify petitioner by registered mail of his right to appeal to the Board of Tax Appeals, the assessment having been made in accordance with petitioner's own computation of the deficiency payable.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

The facts found by the Court of Claims (R. 7–11) may be summarized as follows:

The petitioner filed his individual income-tax return for the year 1917 on April 1, 1918, and paid the tax shown to be due. (R. 7.) The partnership

of McDonnell & Truda, of which the petitioner was a member, filed its return of income on Form 1065 on April 1, 1918, and paid the profits tax computed thereon under Section 209 of the Revenue Act of 1917. (R. 7.) On March 18, 1923, the Commissioner of Internal Revenue made a jeopardy assessment of excess-profits tax for 1917 against the partnership in the amount of $100,005.14. A claim for the abatement of this assessment was filed. (R. 7.)

The Committee on Appeals and Review ultimately recommended that the profits tax of the partnership be computed under the special relief provisions of Section 210 of the Revenue Act of 1917. (R. 7; see the case of *McDonnell & Truda* v. *United States*, October Term, 1932, No. 332, now pending on petition for certiorari.) Thereafter, on November 30, 1925, the Commissioner advised the petitioner that inasmuch as any reduction of the excess profits tax liability of the partnership necessarily involved a corresponding increase in the taxable net income of the partners it would be necessary for petitioner to file a waiver of the statute of limitations applicable to assessment of his individual income tax before the respective tax liabilities of the partnership and the partners could be adjusted. (R. 7.) On February 23, 1926, a waiver with respect to assessment and collection of petitioner's income tax for the year 1917 was duly executed. (R. 9.) This waiver was mailed to the

Commissioner accompanied by a letter from petitioner's attorney stating that petitioner and his copartner were desirous of paying all income taxes justly due from them, and that they had no desire to take any part of the taxes in controversy before the Board of Tax Appeals. (R. 9.)

The tax liability of the partnership was eventually settled on the basis of special assessment, and on May 22, 1926, petitioner was notified by a 30-day letter of a resulting deficiency in his 1917 income tax in the amount of $6,877.62. (R. 9, 10.) On May 26, 1926, petitioner filed a written protest against the proposed deficiency assessment, recomputing the amount due and showing a deficiency in the sum of $4,386.15. (R. 10, 11.) On July 12, 1926, the Commissioner advised petitioner that upon consideration of his protest it had been determined that his computation of the deficiency was correct and that assessment would be made accordingly. (R. 11.) On October 9, 1926, an assessment was made against petitioner in the amount of $4,386.15, and this amount, together with interest, was paid to the Collector on October 23, 1926. (R. 11.)

Petitioner filed two claims for refund alleging that the waiver was invalid, that collection was therefore out of time, and that the Commissioner had failed to comply with the statutory requirements for assessment and collection of the tax.

(R. 11.) These claims were duly rejected, and petitioner brought suit in the Court of Claims, which dismissed the petition. (R. 16.)

DISCUSSION

Petitioner contends in the first place that the waiver of the statute of limitations relating to assessment of taxes for the year 1917 was invalid under Sec. 278 (c) of the Revenue Act of 1924, *infra*, p. 12, because the period of limitation had expired prior to the effective date of that Act, and the waiver was executed after the enactment of the Act. The Court of Claims held that the waiver was nevertheless valid. The decision of the court below on this point is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Company* v. *Commissioner*, 55 F. (2d) 893, where a waiver executed under substantially similar circumstances was held invalid. In the *Uncasville* case this Court denied the taxpayer's petition for certiorari, which did not, however, raise the question of the validity of the waiver, which had been decided in favor of the taxpayer. (286 U. S. 545.)

In its opinion in *Burnet* v. *Chicago Railway Equipment Company*, 282 U. S. 295, this Court said, without deciding the question (p. 300, footnote 5):

> Subdivision (e) can not be said to qualify every other subdivision in Section 278.

> Nothing indicates an intention to have it limit the effect of Section 278 (a), which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * Nor is there any indication that it should qualify subsection (c), which provides for the giving of waivers. * * *

We submit that the decision of the court below was correct; but in view of the conflict of authorities, we do not oppose the granting of the petition so far as it relates to the first question stated, *supra*, page 2.

Although the question is narrow in its scope, and its decision by this Court will control only cases where an assessment was barred on the date of the enactment of the Revenue Act of 1924, and where a waiver consenting to a later assessment and collection of the tax was given after that date and before the date of the enactment of the Revenue Act of 1926, we are advised by the Bureau of Internal Revenue that there are 12 cases of this character pending, involving approximately $625,000 in refunds.

Petitioner also contends that the waiver was invalid by reason of duress because the Commissioner required its execution as a condition precedent to the granting of relief in the nature of special as-

sessment to the partnership of which the petitioner was a member. But it appears that there was in fact no duress. The exchange of correspondence between the Commissioner and the taxpayer and the partnership of which he was a member (R. 7, 8, 9) clearly indicates that the filing of the waivers was voluntary. The petitioner's representative and attorney in fact in forwarding the waiver to the Commissioner wrote (R. 9):

> I wish to state that it has always been the desire of these two gentlemen to pay all the income taxes justly due from them without any attempt to evade such payments by any means whatsoever * * *.
>
> * * * We have no desire to take any part of the taxes in controversy before the Tax Board and are quite eager to settle it as expeditiously as possible within the Internal Revenue Department. The waivers are sent along with this letter as evidence of good faith in order that your conferee may feel thoroughly sure that no unfair advantage is sought by groundless appeals or other delays.

Although there is no finding of the ultimate fact that the waiver was not executed under duress, we submit that the court clearly reached that conclusion, as shown in its opinion. The court below said (R. 12, 13):

> It can not be said that a waiver executed by the plaintiff in order to obtain a reduction

> in the amount of the profits tax due by the partnership through a computation under the relief provisions of the statute was executed by duress. He executed the waiver because it was to his advantage to do so. * * * He was not forced to do so and the results obtained as a result of the execution of the waiver were favorable to him.

The absence of an express finding of an ultimate fact is of no importance if the circumstantial facts as found and as construed by the opinion are such that the ultimate fact follows as a necessary inference. *United States* v. *Wells,* 283 U. S. 102, 120.

Furthermore, the circumstances in the instant case are similar to those in *Burnet* v. *Chicago Railway Equipment Co.,* 282 U. S. 295, where this Court held that a waiver given under a threat by the Commissioner of a jeopardy assessment and enforced collection, when such action would have been illegal, was not invalid because of duress.

It is further contended that the deficiency assessment was invalid because the Commissioner failed to send by registered mail a letter notifying petitioner of the assessment and of his right to appeal to the Board of Tax Appeals within sixty days as provided by Section 274 (a) of the Revenue Act of 1926, *infra,* pp. 12–13. The record shows that petitioner was advised by a thirty-day letter that the Commissioner proposed to make an additional assessment of $6,877.62 for the year 1917; that peti-

tioner filed a written protest against this assessment, recomputing the tax and showing a deficiency of only $4,386.15; and that thereafter the Commissioner advised him by letter that his recomputation had been accepted as correct and that the assessment would be made accordingly. Petitioner had previously stated in a letter dated February 23, 1926, that he had no desire to take the matter before the Board of Tax Appeals. (R. 9.) He paid the tax in the amount which he himself had admitted to be due. Section 274 (a) does not require the Commissioner to advise the taxpayer of his right to appeal to the Board, and in any event we submit that under all the circumstances the Commissioner was fully justified in assuming that the assessment was satisfactory to petitioner and that no appeal was contemplated. Petitioner's acts amounted to a waiver of the right to receive a 60-day letter. Since there is no question that notice of the final determination was actually received by petitioner, the fact that such notice was not sent by registered mail is immaterial. Moreover, the recognized principles of estoppel would seem to be applicable.

CONCLUSION

We submit that the decision of the court below with respect to the questions of duress and sufficiency of notice of the assessment was clearly correct. There is no conflict of authority on these issues. We therefore suggest that the writ, if

granted, be limited to the question of validity of the waiver under Section 278 (e) of the Revenue Act of 1924.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
H. BRIAN HOLLAND,
ERWIN N. GRISWOLD,
Attorneys.

OCTOBER, 1932.

APPENDIX

Section 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300 (U. S. C., Title 26, Secs. 1058, 1059, 1060, 1061, 1062), provides:

> SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.
>
> (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any

time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Section 274 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 55 (U. S. C. App., Title 26, Sec. 1048), provides in part:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such

prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. * * *

U. S. GOVERNMENT PRINTING OFFICE 1932

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No. 331

In the Supreme Court of the United States

OCTOBER TERM, 1932

DOMINIC A. TRUDA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 331

DOMINIC A. TRUDA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the Court of Claims (R. 11) is not yet reported.

JURISDICTION

The judgment of the court below was entered May 31, 1932. (R. 11.) The petition for a writ of certiorari was filed August 31, 1932. (R. 12.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

DISCUSSION

With one exception the facts in the instant case are identical with those in the case of *McDonnell* v.

United States, now pending before this Court on petition for certiorari, October Term, 1932, No. 330. Petitioner, who was in partnership with McDonnell during the year 1917, filed his income tax return for that year on March 29, 1918, and on February 23, 1926, filed a waiver with respect to assessment and collection of additional income tax in order to secure a special assessment of the partnership's excess profits taxes under Section 210 of the Revenue Act of 1917. (R. 6–8.) The only difference between the two cases is that here the petitioner, upon receipt of the 30-day letter advising him of a proposed deficiency assessment of his 1917 income tax, waived his right to appeal to the Board of Tax Appeals and consented to assessment in the amount determined by the Commissioner. (R. 10.) The instant case, therefore, does not present the question of sufficiency of the notice of assessment, which is raised in the *McDonnell* case, but the other two questions presented in that case are in issue here.

For the reasons stated in our memorandum in the *McDonnell* case we do not oppose this petition, but we suggest that the writ, if granted, be limited to the question of validity of the waiver of the statute of limitations under Section 278 (e) of the Revenue Act of 1924.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1932

PETER L. McDONNELL, PETITIONER

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 330

PETER L. McDONNELL, PETITIONER

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 11–16) is reported in 59 F. (2d) 290.

JURISDICTION

The judgment below was entered May 31, 1932. (R. 16.) The petition for a writ of certiorari was filed August 31, 1932 (R. 16), and the writ was granted October 24, 1932 (R. 17). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The writ of certiorari granted by this Court was limited to—

> the question of the validity of the waiver under Section 278 (e) of the Revenue Act of 1924.

The question presented is whether Section 278 (e) of the Revenue Act of 1924 renders invalid waivers executed after the enactment of the Act with respect to taxes, the assessment and collection of which had become barred prior to the effective date of the Act.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

The facts found by the Court of Claims (R. 7–11) may be summarized as follows:

Petitioner filed his individual income-tax return for the year 1917 on April 1, 1918, and paid the tax shown to be due. (R. 7.) The partnership of McDonnell and Truda, of which petitioner was a member, filed its partnership return of income on April 1, 1918, and paid the profits tax computed thereon under Section 209 of the Revenue Act of 1917. (R. 7.) On March 18, 1923, the Commissioner of Internal Revenue made a jeopardy assessment of excess-profits tax for 1917 against the partnership

in the amount of $100,005.14. A claim for abatement of this assessment was filed. (R. 7.)

The Committee on Appeals and Review ultimately recommended that the profits tax of the partnership be computed under the special relief provisions of Section 210 of the Revenue Act of 1917. (R. 7.) Thereafter, on November 30, 1925, the Commissioner advised petitioner that inasmuch as any reduction of the excess-profits tax liability of the partnership necessarily involved a corresponding increase in the taxable net income of the partners, it would be necessary for petitioner to file a waiver of the statute of limitations applicable to assessment of his individual income tax before the respective tax liabilities of the partnership and the partners could be adjusted. (R. 7.) Accordingly, on February 23, 1926, a waiver with respect to assessment and collection of petitioner's income tax for the year 1917 was duly executed. (R. 9.)

Following the filing of this waiver, the tax liability of the partnership was settled on the basis of special assessment, and on May 22, 1926, petitioner was notified by thirty-day letter of a resulting deficiency in his 1917 income tax in the amount of $6,877.62. (R. 9, 10.) This amount was reduced pursuant to a protest filed by petitioner, and on October 9, 1926, an assessment was made against petitioner in the sum of $4,386.15, which sum, together with interest, was paid to the Collector on October 23, 1926. (R. 10, 11.)

Petitioner duly filed two claims for refund, alleging, *inter alia,* that the waiver was invalid, and that the tax was, therefore, collected out of time. (R. 11.) These claims were rejected (R. 11), and petitioner brought suit in the Court of Claims, which dismissed the petition (R. 16).

SUMMARY OF ARGUMENT

The petitioner contends that the waiver executed on February 23, 1926, was invalid under Sec. 278 (e) of the Revenue Act of 1924, because assessment of the tax was barred at the date of the enactment of that Act. But the waiver did not depend on Sec. 278 of the Revenue Act of 1924 for its validity (*Aiken* v. *Burnet,* 282 U. S. 277), nor was it invalid because executed after the statute of limitations had expired. *Stange* v. *United States,* 282 U. S. 270. The waiver needs no statutory sanction. It stands and is effective by itself. Sec. 278 (e) of the Revenue Act of 1924 at most imposes a limitation upon other provisions of the same section. Since those provisions need not be relied upon to support the validity of the waiver their limitation or qualification is not significant.

If reliance on Sec. 278 (c) of the Revenue Act of 1924 were necessary to sustain the waiver, that provision is not limited by Sec. 278 (e). *Burnet* v. *Chicago Railway Equipment Co.,* 282 U. S. 295, 300. Statutes imposing limitations upon the right of the Government to assess and collect taxes must be strictly construed and doubtful interpretations

must be resolved against the taxpayer. But all doubt as to the validity of the waiver in this case is removed by Sec. 278 of the Revenue Act of 1926. That section prevents the assessment or collection of a tax barred at the date of the enactment of the Act "unless prior to the enactment" a waiver was executed. Thus the 1926 Act sanctions waivers filed prior to its enactment, without reference to the Revenue Act of 1924.

If the waiver were invalid the taxpayer would be estopped from questioning its validity. The waiver was filed to secure a special assessment for the partnership of which petitioner was a member. The special assessment was allowed and the partnership tax was substantially reduced. The Commissioner changed his position in reliance upon the waiver, and the taxpayer, having personally benefited thereby, may not repudiate the waiver upon which the Commissioner relied. *Magee* v. *United States,* 282 U. S. 432, 434.

ARGUMENT

The petitioner's income tax return for the year 1917 was filed on April 1, 1918. (R. 7.) Under Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265,[1] the period of limitation on assessment and collection of the petitioner's tax

[1] This statute provided that the amount of taxes due for the year 1917 "shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no

for 1917 expired April 1, 1923, with the qualification, contained in the statute itself, that the period might be extended if both the Commissioner and the taxpayer consented in writing to a later assessment and collection of the tax.

On February 23, 1926, the petitioner and the Commissioner executed a consent in writing, waiving "the time prescribed by law for making any assessment of the amount of * * * taxes due under any return made by or on behalf of said taxpayer for the year 1917 * * *." (R. 9.) The question in this case is whether this waiver made valid the assessment and collection of the tax in October, 1926. (R. 10, 11.)

This Court has held that no express statutory provision is necessary to make valid a waiver by a taxpayer of the period of limitation on the assessment or collection of a tax. *Aiken* v. *Burnet,* 282 U. S. 277; *Brown & Sons Co.* v. *Burnet,* 282 U. S. 283. It has also been held that an assessment and collection waiver is not invalid merely because it was executed after the period of limitation had expired. *Stange* v. *United States,* 282 U. S. 270; *Burnet* v. *Chicago Railway Equipment Co.,* 282 U. S. 295.

From these decisions it follows that the waiver executed in this case was valid and effective unless it was rendered invalid by some express enactment

---

suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

of Congress. The ultimate question, therefore, is whether Congress has expressed an intention to prevent taxpayers from doing what they could do without the authority of any statute.

The statute upon which the petitioner relies is Section 278 of the Revenue Act of 1924 (*infra,* pp. 20–21), which was in effect at the time the waiver in question was executed. Section 277 of the Revenue Act of 1924 established periods of limitation for the assessment and collection of all taxes imposed by that Act and by earlier Acts. But Section 277 was expressly made subject to exceptions contained in Section 278. Section 278 contains five paragraphs. Paragraph (a) provided that in the case of a false or fraudulent return the assessment and collection of the tax might be made at any time. Paragraph (b) provided that any deficiency due to a change in an amortization allowance under the Revenue Acts of 1918 or 1921 might be assessed or collected at any time. Paragraph (c) of Section 278 provides as follows:

> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

Paragraph (d) provided that where a tax had been assessed within the period prescribed in Section 277 or Section 278 it might be collected within six years after the assessment of the tax. Paragraph

(e), the final paragraph of this Section, provided as follows:

> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

The petitioner's argument is that paragraph (e) of Section 278 makes the waiver in this case ineffective, since the assessment and collection of the tax was barred on April 1, 1923, prior to the enactment of the Revenue Act of 1924. We believe that there are four answers to this argument: First, that the Government does not need to rely on any part of Section 278 to support the waiver; second, that if Section 278 (c) were relied upon, Section 278 (e) does not make the waiver invalid; third, that any doubt as to the validity of the waiver under the Revenue Act of 1924 is removed by Section 278 of the Revenue Act of 1926; and, fourth, that, even if the waiver were invalid, the petitioner would be estopped to raise the question.

I

THE WAIVER DID NOT DEPEND ON SECTION 278 (C) FOR ITS VALIDITY

It has already been pointed out that a waiver does not require statutory authority for its validity

(*Aiken* v. *Burnet*, 282 U. S. 277, *supra*), and that a waiver is not rendered invalid because it was executed after the statute of limitations has expired (*Stange* v. *United States*, 282 U. S. 270, *supra*; *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S. 295, *supra*). There is consequently no need to rely upon any statute to support the validity of the waiver in question; it stands, and is effective, by itself. Its validity, therefore, is not affected by Section 278 (e) of the Revenue Act of 1924 because that paragraph at most imposes only a limitation upon the authorizations by other paragraphs of the section. Since those authorizations need not be relied upon, their limitation or qualification is not significant.

It may be argued that Congress intended by Section 278 (c) to displace nonstatutory waivers and to provide an exclusive substitute for them, so that all waivers thereafter executed would find their support only in the statute. But we believe that this is not a proper interpretation of the statute. The making and accepting of waivers grew out of administrative practice without express authority of any statute. But since the origin of these waivers was in a sense extra-legal, doubts arose as to their validity, and these doubts as to the prestatutory waivers were not removed until 1931 when this Court's decision in *Aiken* v. *Burnet*, 282 U. S. 277, *supra*, was announced.

It seems obvious that the purpose of Congress in referring to waivers in Section 250 (d) of the Reve-

nue Act of 1921 and Section 278 (c) of the Revenue Act of 1924 was not to authorize such waivers, but to recognize them, and thus to remove doubts which then existed as to their validity.[2] These statutes were enabling in nature, not restrictive. Their purpose, we believe, was to ratify, not to deny. There is nothing in these statutes to indicate any intention on the part of Congress to do anything more than remove the doubts which otherwise existed as to the efficacy of waivers. The waiver in this case, therefore, does not depend upon Section 278 (c); it is merely recognized by that section; and thus Section 278 (e) is immaterial, because the validity of the assessment and collection of the tax in question does not depend on any provision of Section 278.

II

EVEN IF RELIANCE ON SECTION 278 (c) OF THE REVENUE ACT OF 1924 IS NECESSARY TO SUSTAIN THE WAIVER, THAT PROVISION IS NOT LIMITED BY SECTION 278 (e)

If Section 278 (c) were relied on by the Government, the waiver in this case would not be ineffective because of Section 278 (e). The precise question was considered by this Court in *Burnet* v. *Chicago Railway Equipment Company*, 282 U. S. 295, *supra*, althought the discussion was not strictly

[2] These sections, it is true, did impose the requirement that waivers be in writing, and that, for administrative purposes, they be signed by the Commissioner. Both of these requirements have been met in this case. (R. 9.)

necessary to the decision of that case. This Court there said (p. 300, n. 5):

> Subdivision (e) can not be said to qualify every other subdivision in §278. Nothing indicates an intention to have it limit the effect of §278 (a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. * * * The decision in *Russell* v. *United States*, 278 U. S. 181, involved the interpretation of subdivision (d) which extended the period for collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver.

This statement was adopted by the court below as authority for its decision, and also by the Circuit Court of Appeals for the Ninth Circuit in *Pacific Coast Steel Co.* v. *McLaughlin*, 61 F. (2d) 73, now pending on petition for certiorari, No. 518, October Term, 1932. The latter case involved a collection waiver and it was held that Section 278 (e) of the 1924 Act did not prohibit the filing of the waiver although collection was barred at the time of the enactment of the Act. See also *Pottash Brothers* v. *Burnet*, 50 F. (2d) 317 (App. D. C.).[3]

[3] In the *Pottash Brothers* case the Board of Tax Appeals found that the taxpayer had filed a series of waivers, but the finding failed to specify when or for what period the

The only dissent from this conclusion is found in the decision of the Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 F. (2d) 893.[4] The Circuit Court of Appeals in the *Uncasville* case took the view that Section 278 (e) of the Revenue Act of 1924 made ineffective waivers executed after the enactment of that Act if the assessment was barred prior to the enactment. In reaching this conclusion, the court indicated that the intent of Congress to create such a restriction was not clearly evidenced, but argued that paragraph (e) of Section 278 can not possibly apply to paragraphs (a), (b), or (d), and that unless it be construed as a limitation upon paragraph (c), which relates to waivers, it has no meaning whatever as far as assessments are concerned.

It is true that paragraph (e) does not appear to be applicable to paragraph (a) or (b). But this Court has held that it limits the effect of (d) in such a way as to permit collection within six years after assessment only in cases where assessment was made after the date of the Act. *Russell* v. *United States,* 278 U. S. 181. In the *Uncasville* case, however, the court argued that since (d)

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waivers were filed. The Court of Appeals relied on a waiver filed after the enactment of the 1924 Act, although the limitation on assessment had expired prior to that date. The effect of Section 278 (e) was not discussed, the court relying on *Stange* v. *United States,* 282 U. S. 270, *supra.*

[4] This Court denied a petition for certiorari filed by the taxpayer, which did not raise the present question. 286 U. S. 545.

governs only collections the decision in the *Russell* case fails to supply a meaning for that part of (e) which refers to assessments. Paragraph (d) changed the existing law by extending the period for collection to six years from the date of assessment "where the assessment of the tax is made within the period prescribed in section 277 or in this section * * *." Congress, realizing that there might be some doubt as to the effect of Sections 277 and 278 upon each other, may have inserted the reference to "assessment" in Section 278 (e) in order to make it clear that the extension of time for collection should not be regarded as authorizing assessment already barred by the applicable statute of limitations.

If Congress had intended that paragraph (e) should limit paragraph (c), such intention could have been clearly and unequivocally expressed by a specific provision to that effect. In *Pacific Coast Steel Co.* v. *McLaughlin*, 61 F. (2d) 73 (C. C. A. 9th), *supra*, the court said (p. 75):

> We find no language in subdivision (e) of section 278 or in any other part of the act of 1924 that expressly forbids taxpayers from, pursuant to the comprehensive wording of subdivision (c), voluntarily waiving the bar against the collection of validly assessed and unpaid taxes, the collection of which was barred on June 2, 1924. Subdivision (e) merely declares that section 278 of the 1924 act shall not authorize the assessment or the

> collection of such taxes. There being no clear prohibition against taxpayer's voluntary waiver or limitation for collecting taxes that have been timely assessed, it would be straining and amplifying the terms of (e) and unnecessarily restricting the broad and inclusive language of (c) to construe section 278 as appellant contends. We should not adopt a construction that would require giving to the statute a meaning not expressed by the language used.

Section 278 (e) of the 1926 Act, which is discussed in Point III below, indicates that Congress believed that all waivers previously filed were valid. This is even more apparent from the legislative history of the Revenue Act of 1928, which made substantial changes in the provisions relating to waivers. Section 506 of that Act, as originally presented to the House of Representatives, expressly provided that waivers could be filed after the expiration of the period of limitations. In commenting on that section, the Committee on Ways and Means said (House Report No. 2, 70th Congress, 1st Session, p. 29):

> Waivers filed prior to the 1926 Act are undoubtedly valid and have been so held by the Board of Tax Appeals. * * *

Statutes limiting the rights of the Government must be strictly construed. *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *Loewer Realty Co.* v. *Anderson,* 31 F. (2d) 268, 269 (C. C. A. 2nd), certiorari denied, 280 U. S. 558. Conse-

quently, we submit that an intention on the part of Congress to restrict the long-recognized power of a taxpayer to waive the statute of limitations applicable to the assessment or collection of his tax should not be found in the absence of a clear and unequivocal provision to that effect.

III

ALL DOUBT AS TO THE VALIDITY OF THE WAIVER UNDER SECTION 278 OF THE REVENUE ACT OF 1924 IS REMOVED BY SECTION 278 OF THE REVENUE ACT OF 1926

If there were any doubt about the validity of the waiver, we submit that it is removed by Section 278 of the Revenue Act of 1926. Sections 277 and 278 of the Revenue Act of 1926 superseded the corresponding Sections of the Revenue Act of 1924, and provided a comprehensive rule for the assessment and collection of all taxes then unpaid, including the tax now in question. Paragraph (e) of Section 278 of the Revenue Act of 1926 differed from the corresponding paragraph of Section 278 of the 1924 Act by providing that the Section should not authorize assessment of a tax barred at the date of the enactment of the Act—

> unless *prior to the enactment of this Act* the Commissioner and the taxpayer agreed in writing thereto, * * *. (Italics ours.)

Thus the 1926 Act clearly sanctions waivers filed prior to its enactment, without any reference to the

question whether such waivers would have been valid under the Revenue Act of 1924.[5] It is expressly applicable to this case. The Commissioner and the taxpayer having "consented in writing to the assessment of the tax after the time prescribed in section 277," the tax could be collected "at any time prior to the expiration of the period agreed upon," under Section 278 (c); and this is in no way limited by Section 278 (e) of the 1926 Act, since "prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing" to assessment and collection within the terms of the waiver. Even if the right to assess and collect were barred under the statutes in effect prior to the enactment of the 1926 Act, it is plain that Congress had the power to revive those rights under the circumstances of this case. *Graham & Foster* v. *Goodcell*, 282 U. S. 409.

IV

THE TAXPAYER IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE WAIVER

In any event, we believe that the petitioner is estopped to object to the validity of the waiver on the ground that it was filed too late. When the waiver was filed, the petitioner and his partner were

[5] This argument is not affected, we believe, by Section 506 (c) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870 (U. S. C. Sup. V, Title 26, Secs. 1060–1062), which plainly was intended only to prevent the amendments con-

seeking special relief under Section 210 of the Revenue Act of 1917 with respect to assessment of the partnership's income and profits taxes for that year. See *McDonnell & Truda* v. *United States,* 59 F. (2d) 295 (C. Cls.), certiorari denied, October 24, 1932, No. 332, October Term, 1932. The granting of such relief necessarily involved a recomputation of the petitioner's income, since any reduction in the excess profits tax liability of the partnership automatically resulted in a corresponding increase in the taxable net income of the partners. The waiver now in issue was filed for the express purpose of securing special assessment for the partnership. (R. 9.) The special assessment was allowed, and the partnership tax was substantially reduced. The Commissioner, therefore, changed his position in reliance upon the taxpayer's consent. We submit that since the taxpayer benefited by the waiver, he is not in a position to question its legality.

The petitioner's position is very similar to that of the taxpayer in *Magee* v. *United States,* 282 U. S. 432. The taxpayer there contended that a claim in abatement which he filed in 1921 was illegal under Section 250 (d) of the Revenue Act of 1921, and that therefore his case was not covered by Section

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tained in Sections 506 (a) and 506 (b) from affecting waivers already executed. See House Report No. 2, 70th Congress, 1st sess., p. 29; Senate Report No. 960, 70th Congress, 1st sess., p. 36.

611 of the Revenue Act of 1928. This Court rejected the contention, saying (p. 434)—

> The taxpayer benefited by the claim and is not in a position to contest its legality.

See also *Florsheim Brothers Dry Goods Co.* v. *United States,* 280 U. S. 453, 464; *United States* v. *John Barth Co.,* 279 U. S. 370, 376; *Ralston Purina Co.* v. *United States,* 58 F. (2d) 1065 (C. Cls.); *Lucas* v. *Hunt,* 45 F. (2d) 781 (C. C. A. 5th).

CONCLUSION

The judgment of the Court of Claims is correct and should be affirmed.

Respectfully submitted.

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DECEMBER, 1932.

APPENDIX

Sections 277 and 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300 (U. S. C., Title 26, Secs. 1057, 1058–1062), provide:

> SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> (1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(3) In the case of income received during the lifetime of a decedent, the tax shall be assessed, and any proceeding in court for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, but not after the expiration of the period prescribed for the assessment of the tax in paragraph (1) or (2) of this subdivision.

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(c) Where both the Commissioner and the taxpayer have consented in writing to the

assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Section 278 (c) and (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59 (U. S. C. App., Title 26, Sec. 1062), provides:

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or

the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

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No. 331

In the Supreme Court of the United States

OCTOBER TERM, 1932

DOMINIC A. TRUDA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 331

DOMINIC A. TRUDA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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OPINION BELOW

The memorandum opinion of the Court of Claims (R. 11) is not yet reported.

JURISDICTION

The judgment of the court below was entered May 31, 1932. (R. 11.) The petition for a writ of certiorari was filed August 31, 1932 (R. 12), and the writ was granted October 24, 1932 (R. 13). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

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DISCUSSION

The question involved in this case as limited by the order of this Court granting the writ of certiorari is exactly the same as the question in *Peter L. McDonnell* v. *United States,* No. 330, current term. The facts relevant to the question are likewise the same in both cases. The argument presented on behalf of the Government in its brief in the *McDonnell* case applies equally to the instant case. For the reasons there stated we submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 330 and 331.

PETER L. McDONNELL, *Petitioner*,

vs.

THE UNITED STATES.

DOMINIC A. TRUDA, *Petitioner*,

vs.

THE UNITED STATES.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF.

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THE UNITED STATES.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

The undersigned, attorneys for taxpayers having cases pending in the Court of Claims and in the Bureau of Internal Revenue, involving the question presented in the above-named cases, respectfully move this Court for leave to file the subjoined brief as friends of the Court.

FRED A. WOODIS.

FRANCIS R. LASH,
Of Counsel.

BRIEF AMICI CURIAE.

ARGUMENT.

The question presented is limited by the order allowing certiorari to the following:

> Does Section 278 (e) of the Revenue Act of 1924 render invalid waivers executed after the enactment of the Revenue Act of 1924 with respect to taxes the assessment and collection of which had become barred prior to the enactment of the Act.

Stated differently, the question is:

> Did Section 278 of the Revenue Act of 1924 authorize the extension by waiver, after its enactment, of the period provided in Section 277 of the same Act, with respect to taxes the assessment and collection of which had become barred prior to the effective date of the Act.

Before addressing ourselves to the precise question at issue, we wish to touch briefly upon certain general rules of statutory construction which must guide our approach to the ultimate question, and which are, in the last analysis, determinative of the question involved.

The statute involved is one levying taxes and, therefore, must be construed strictly against the Government and liberally in favor of the taxpayer (*Gould v. Gould*, 245 U. S. 151, 153; *United States v. Merriam*, 263 U. S. 179, 188, 189). It was made possible of enactment only by a Constitutional Amendment, being repugnant to the Constitution as originally adopted, and likewise being in derogation of the common law; for these reasons, we submit, the statute must be construed strictly against the sovereign.

Beginning with the Acts enacted prior to the 1918 Act, Congress provided a statutory period of three years within which income taxes must be assessed, and all assessments

made under such Acts must have been made within such three year period in order to be legally collectible (*Aiken v. Burnet*, 282 U. S. 277, 280, n. 2; *Stange v. United States*, 282 U. S. 270, 274, n. 2; *Brown & Sons Co. v. Burnet*, 282 U. S. 283, 286, n. 2). However, where such assessments were timely made they could be collected at any time, until the enactment of the 1921 Act which provided in section 250 (d) that such taxes must be both assessed and collected within five years after the taxpayer's return was filed, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection."

That enactment was the first wherein Congress provided a statutory method (by waivers) of enlarging or extending the statutory period otherwise applicable to the assessment and collection of income taxes. Written consents (waivers) to extend the statutory period of limitation, executed prior to the statutory grant of authority so to do, as pointed out by the court below (McDonnell R. 13, 14), have been held by this Court to be effective **in the absence of a statute** providing for a method extending the statutory period (*Aiken v. Burnet, supra*); such holding, by this Court, having been predicated upon the authority of the Commissioner to promulgate and enforce administrative regulations on the subject. However, that decision **did not** announce that the Commissioner might promulgate or enforce regulations contrary to existing statutes on the subject, nor is it authority for the contention, made by respondents in these cases, "that no express statutory provision is necessary to make valid a waiver by a taxpayer of the period of limitation on the assessment or collection of a tax."

Thereafter Congress enacted the Revenue Act of 1924 providing therein (Section 277) that taxes imposed by the Revenue Act of 1917 (such as those here involved) must be assessed and collected within five years after the

taxpayer's return was filed **except as provided in Section 278** of the same Act.

The pertinent portions of section 278 are:

> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> * * * * * * * * *
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, * * *.

Congress continued this policy of providing a **statutory** method of extending the period of limitation, in the later Acts of 1926, 1928, and 1932.

The broad question presented by these cases to the court below (the gravamen of petitioners' actions brought below), was whether the statutory period of limitation for assessment and collection of the taxes had expired at the time such assessments and collections were made.

When these taxes were assessed and collected the Revenue Act of 1926 was in effect; that Act, as did the 1921 and 1924 Acts, provided a statutory period of five years within which taxes for the year 1917 must be assessed and collected (See Sec. 277), subject to the exceptions contained in Sec. 278 of the same Act.

Of those exceptions, those pertinent here are:

> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> * * * * * * * * *

> (e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding, was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, * * *.

Subdivision (c) of Section 278 of the 1926 Act, quoted above, was wholly prospective, providing for the extension of the five year period by the Commissioner and the taxpayer **after its passage**; but it was not a ratification of the acts of the parties consummated prior to its enactment.

Subdivision (e) prevents the application of the section to any case wherein assessment and collection were barred at the time of its enactment "unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto." The agreements referred to by Congress in this qualifying clause, were **valid and effective** agreements; Congress did not mean that if ineffective or invalid agreements (waivers) had been executed prior to that Act, that the clause in question should validate them.

Respondent contends, however, that even if the right to assess and collect was barred under the statutes in effect prior to the enactment of the 1926 Act, it is plain that Congress had the power to and did revive that right by section 278 of the 1926 Act (respondent's brief pp. 15, 16). That such view of respondent is erroneous, seems clear. For this Court in the case of *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, declared at page 162:

> "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

No plain purpose to change the status of the Government's claims against petitioners as they existed just prior to February 26, 1926, can be spelled out of the words in Section 278.

To determine whether the waivers in question were valid when given, it is necessary to consider the law in effect **at the time they were filed.**

The legislative history of Section 506 of the Revenue Act of 1928 in its entirety, a part of which has been relied upon by respondent to show that Congress believed all waivers filed prior to the Revenue Act of 1926 were valid, confirms the view that the 1924 Act alone determines the validity of the waivers in question. In support of respondent's view to the contrary, however, there was quoted from the House Report No. 2, 70th Congress, 1st Session, p. 29, (respondent's brief p. 14) as follows: "Waivers filed prior to the 1926 Act are undoubtedly valid and have been so held by the Board of Tax Appeals. * * *" That quoted statement was made in the House Report as part explanation of the House draft of Section 506 of the 1928 Bill whereby it was provided that all waivers were valid whether given before or after the statute of limitations had run. The Finance Committee of the Senate, amended the House draft of Section 506, however, to provide that of future waivers, only those given **before** the expiration of the statute of limitation would be valid (except those filed between the dates of the enactment of the 1928 Act and January 1, 1929, with which we are not here concerned); but, with reference to waivers filed before the enactment of the 1928 Act, the Senate amendment definitely provided, as stated in Senate Report No. 960, 70th Congress, 1st sess. (p. 36), that:

> "* * * As to waivers filed before the enactment of this act but after the expiration of the period of limitation, the committee feels that the matter should *be left where it now stands*, to be determined *under the law in existence at the time the waiver is filed*, and by

an amendment to the House bill carries that policy into effect." (Italics ours.)

The conferees of the House accepted the Senate revision of Section 506, and Conference Report No. 1882, 70th Congress, 1st sess. contained the following statement with reference thereto (p. 21):

> "These amendments which relate to the validity of waivers executed after the expiration of the period of limitation intended to be waived, are similar to amendments Nos. 131, 132, 133, and 134 above. The House bill made such waivers effective even though executed after the expiration of such period. The Senate amendment confines the provisions to waivers executed before the expiration of the period; and the House recedes."

Section 506 as enacted, therefore, provides:

> (c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting *the validity* of waivers made prior to the enactment of this Act, which *shall be determined according to the law in existence at the time such waiver was filed.* (Italics ours.)

It is submitted, therefore, that when determining the validity of the waivers in question, Section 506 of the 1928 Act must be given effect, for by that section Congress specifically provided a statutory rule to be followed by the courts in determining the effectiveness or validity of **all** waivers. That section expressly provides that the validity of all waivers **shall be determined according to the law in existence at the time they were filed.** The 1924 Act was in effect when the waivers were filed in the instant cases, hence we must look to that Act in order to determine their validity.

Admittedly the taxes were barred when assessed and collected, unless the waivers given on February 23, 1926, were effective to extend the time beyond the date of enact-

ment of the 1926 Act and likewise to include the date of assessment and collection. This brings us immediately to our consideration of the effect of the waivers.

At the time the Commissioner required petitioners to execute the waivers in these cases the 1924 Act was in effect; also, when they were executed the statutory period had expired, it having expired on April 1, 1923, fourteen months prior to the enactment of the 1924 Act, and two years, ~~thirteen~~ fourteen months prior to the execution of the waivers.

The Revenue Act of 1924, then in effect, provided in Section 277 that taxes due for 1917 (the year here involved) should be assessed and collected within five years after the return was filed except as provided in Section 278, *supra*.

The exception provided in Section 278, to the applicable five year period, was that the Commissioner and the taxpayer might consent in writing to extend that time; that they might execute a written waiver. However, it is submitted, such exception was limited by subdivision (c) of the same section to those cases **not already barred** at the time of the enactment of that Act.

This point is the crux of these cases and presents the ultimate question to be determined by this Court, pursuant to the order granting certiorari, *supra*.

Subdivision (c) of Section 278 of the Revenue Act of 1924—the Act in effect when these waivers were executed—constituted the sole authority, **statutory or otherwise**, for the extension of the applicable general statutory period; and, because of the limitation placed upon that subdivision by subdivision (c) of the same section, it did not authorize the extension of such statutory period, if such period had already expired prior to the passage of that Act.

In support of this position, we respectfully submit the following.

I.

Where Congress Enacts a Statutory Exception to the General Statutory Rule, that Exception is Exclusive.

The general rule—effective when the waivers were given—limiting the time within which the Commissioner might assess and collect further taxes in these cases, was provided in Section 277 of the 1924 Act; by that section Congress enacted the five year period of limitation. To the general rule thus provided, there was but one exception (pertinent here) provided by Congress, *i. e.*, Section 278. Unless these cases come within that one exception, the taxes were barred when assessed and collected.

Unless these waivers are such as were authorized by Section 278, and unless they and the cases in which they were given come within the terms of the exception for which such section provided, the exception to Section 277, provided in Section 278 **does not apply.** There is no exception to the general rule of five years, provided by Section 277, pertinent to our present consideration, **other than Section** 278; if the facts relied upon by respondent do not make out the case provided for by Section 278, it will not avail respondent to contend that such facts constitute a common law exception, for an express exception to a general statutory rule **excludes all other exceptions** (*Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 233; *Bond v. Hoyt*, 13 Pet. 261).

An exception to the enacting clause must be strictly construed, so as to take out of such enacting clause **only** those cases which fall fairly and squarely within the terms of such exception, and the burden of proving the existence of such exception is on one claiming its benefit (*Thomas E. Basham Co. v. Lucas*, 21 Fed. (2d) 550). See also *United States v. Dickson*, 15 Pet. 141, where this Court, speaking through Mr. Justice Story, at page 165, held:

> "* * * we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterward introduced, that proviso is construed *strictly* and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves *special exceptions only* out of the enacting clause; and those who set up any such exception, must establish it as being *within the words* as well as within the reason thereof." (Italics ours.)

The enacting clause applicable here is Section 277 of the 1924 Act, which enacted the five year period of limitation, subject to the exceptions contained in Section 278 of the same Act. Unless the facts in these cases bring them squarely within the provisions of the exception (Section 278), then, under the applicable rules of statutory construction, above-stated, the exception is wholly inapplicable and respondent's defense must fall.

To this latter question we next address ourselves.

II.

Where the Tax Was Barred at the Time of the Enactment of the Revenue Act of 1924, Section 278 (c) Thereof Did Not Authorize Waivers.

The exception contained in Section 278 (c) of the 1924 Act, *i. e.*, where the Commissioner and the taxpayer consent in writing that the tax may be assessed after the five year period, is inapplicable here because subdivision (e), of the same section, limited the application of (c) to cases **without the scope of** (e); these cases are without the scope of subdivision (c) as the taxes were barred when the 1924 Act was passed.

We now consider the ultimate question presented by the cases, namely: whether, because of the limitation placed upon it by subdivision (e) of the same section, Section 278 (c) authorized the waivers.

The court below, in recording its dissent from the decision of the Circuit Court of Appeals for the 2nd Circuit, in the case of *Uncasville Mfg. Co. v. Commissioner*, 55 Fed. (2d) 893, which decision on this point held against the Government, stated: "In the *Uncasville Mfg. Company case* the court construed section 278 (c) of the revenue act of 1924 as a *prohibition* upon the giving of a waiver by a taxpayer and the acceptance thereof by the Commissioner. We are unable to find any provision in the 1924 revenue act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitation, nor do we find anything in such act prohibiting the commissioner's acceptance of such waiver." The court below was in error in so narrowly restricting its view of the matter. Manifestly, subdivision (c) of Section 278 standing alone does not constitute a prohibition of waivers, nor does any other single provision of the 1924 Act do so. It is only when we read Sections 277 and 278 (c) and (c) together, as we must do, that we find the prohibition to exist as relating to cases falling within the terms of subdivision (c) i. e., where the tax was barred when that Act was passed.

More strictly speaking, the existing prohibition is provided in Section 277, for there is provided the general rule of five years, subject to the exception provided in Section 278; if that exception, which provides for waivers in certain cases, is—as contended by petitioners—inapplicable, then the general rule of Section 277 must be enforced, and that rule is **an absolute and positive prohibition of assessment and collection after five years.** Thus, we find that the waivers in these cases **were prohibited.**

In urging upon this Court the adoption of the conclusion reached by the Circuit Court of Appeals in the *Uncasville case, supra*, we submit, in addition to the very cogent reasons relied upon by that court, the following.

In enacting Section 278 which provided a further period of time for both assessment and collection of taxes, in ad-

dition to the period provided in Section 277, Congress expressly provided, by enacting the qualifying subdivision (e), that such further period was **not to be extended** to cases within the purview of that subdivision, i. e., where **assessment or collection was barred** at the time of the enactment of the Act, or where the assessment or a proceeding to collect had been made or begun prior to its enactment.

Congress could not have employed more specific language to accomplish its purpose; the subdivision is clear, plain, and unambiguous, and will admit of no strained construction. It must be applied as we find it, and it has been applied by this Court in that very manner, in the case of *Russell et al. v. United States*, 278 U. S. 181.

In that case the Court had for its consideration the effect of Section 278 upon cases falling within clause (2) of subdivision (e); though we are now concerned with clause (1) of that subdivision, we submit that because of the unity of purpose of Congress in enacting it, so apparent from its context, the subdivision must be considered as a whole, and what the Court there said is equally applicable here.

The Court, speaking through Mr. Justice McReynolds, beginning at page 187, said:

> "But section 278 further provides that it shall *not authorize* the collection of a tax *after the same has become barred* by the applicable statute, * * *"
>
> "If an assessment made before that date comes within the ambit of section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—* * * United States v. Magnolia Petroleum Co., 276 U. S. 160, 48 S. Ct. 236, 72 L. Ed. 509, declares, 'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.' No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can *be spelled out of the words in section 278 or otherwhere.*"

> "* * * Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive section 278 of any possible application to cases where assessment had been made prior to June 2, 1924." (Italics ours.)

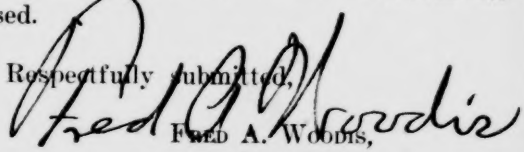
Sound reasoning impels us to the conclusion that Congress would have less reason to prohibit the application of Section 278 to cases wherein assessment had already been made, either timely or untimely, than to prohibit its application to cases where assessment and/or collection were barred at the time of its enactment; for those cases of the former instance would be those where the Commissioner had performed the preliminary acts necessary to collect the additional tax, wherefore, if the section was intended to have any retroactive effect such effect would certainly have been extended to that class of cases (where the Commissioner had so far prevented jeopardy to the rights of the Government by making the assessment within the statutory period). Yet, this Court held in the *Russell case, supra,* that, because of the qualification contained in the subdivision we are now considering, the section was deprived of any application to such cases.

Thus if the intention of Congress was that the section should not apply to those cases where the Commissioner had already proceeded to preserve and protect the interests of the Government, as above pointed out, how can it be said that its intention was that the section should apply, nevertheless, to those cases where the Commissioner had *not taken any of the steps* necessary to prevent jeopardy to the Government's interests, i. e., those cases in which he had slumbered, and, had permitted the bar of the statute to fall against the Government? We submit that *a fortiori* Congress did not intend the latter, and further submit that it plainly evidenced a contrary intention by enacting the provision in question.

CONCLUSION.

The judgments of the Court of Claims are erroneous and should be reversed.

Respectfully submitted,



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January, 1933.

SUPREME COURT OF THE UNITED STATES.

Nos. 330 and 331.—October Term, 1932.

330 Peter L. McDonnell, Petitioner, *vs.* The United States.

331 Dominic A. Truda, Petitioner, *vs.* The United States.

On Writs of Certiorari to the Court of Claims.

[March 13, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases arose out of the same transaction and present, on substantially the same facts, the same question of law. Reference will be made in the opinion only to the McDonnell case.

The action was brought by McDonnell in the Court of Claims on November 4, 1929 to recover $4,549.03 with interest from the date of payment, October 23, 1926. McDonnell filed his individual income-tax return for 1917 on April 1, 1918, and paid the amount shown thereon to be due. The sum now sought to be recovered was paid to the collector of internal revenue for the Second District of New York pursuant to an assessment of an additional income tax for the year 1917, which was made by the Commissioner of Internal Revenue on October 9, 1926. There had been a waiver on February 23, 1926 of the statutory limitation upon the time for making the assessment. Claims for refund were made on December 27, 1928 and May 31, 1929, alleging that the waiver was invalid and that the amount claimed was collected after the running of the statute. The claims for refund were rejected on March 6, 1929 and July 25, 1929. The Court of Claims entered judgment for the defendant. 59 F. (2d) 290. Because of conflict of the decision with that in *Uncasville Manufacturing Co.* v. *Commissioner*, 55 F. (2d) 893, certiorari was granted, limited to the question of the validity of the waiver under Section 278 (c) of the Revenue Act of 1924. 287 U. S. —.

The waiver was given under the following circumstances. McDonnell was in 1917 a member of the firm of McDonnell & Truda,

which in that year filed its income tax return and paid the taxes therein shown to be due. On March 18, 1923, that is, within five years after the filing of the return and before the expiration of the period allowed by § 250 (d) of the Revenue Act of 1921 for assessment and collection of an additional tax, the Commissioner made a jeopardy assessment against the firm of $100,005.14. On November 30, 1925, that is, after the expiration of the statutory period for making an additional assessment against the plaintiff, the Commissioner notified the plaintiff that the amount payable by the firm for additional tax should, because of errors, be reduced to $24,863.28; but that a reduction of the liability of the partnership necessitated additional taxes to the individual members of the firm; and that he would not make the reduction to the firm unless plaintiff and his partner would waive the statute of limitations so as to permit additional individual taxes and would pay the amounts assessed against them. Each gave the waiver requested and paid the amount now sought to be recovered.

It is conceded by McDonnell that the tax was payable, unless it was barred by the period of limitations prescribed in § 250 (d) of the Revenue Act of 1921 or § 277 (a) (2) of the Revenue Act of 1924. It is conceded by the Government that it was so barred, unless the limitation was removed by the waiver signed by McDonnell on February 23, 1926, which, by its terms, purported to extend to December 31, 1926 the time within which the Commissioner could assess additional taxes for the year 1917.

McDonnell claims that the Revenue Act of June 2, 1924 renders the waiver ineffective, because the assessment of the tax had been barred on April 1, 1923. The contention is that, since the period of limitation had expired before the passage of the 1924 Act, the waiver was inoperative under the express terms of paragraph (e) of § 278 of that Act, which declares:

"This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made or distraint or proceeding in court begun, before the enactment of this Act."[1]

[1] Act of June 2, 1924, c. 234, § 278 (e), 43 Stat. 253, 300. The preceding paragraphs of the section are as follows:

"(a) In the case of a false or fraudulent return with intent to evade tax

The contention of the petitioner, expressed in different terms, is that waivers executed subsequent to June 2, 1924 are invalid where the date of filing the return was such that the five-year period for assessment elapsed before June 2, 1924. Obviously, the waiver would have been good if executed before June 2, 1924, the period of limitation expiring when it did; for in that event the assessment would not have been "barred by the period of limitation" at the time of the enactment of the 1924 Act. The fact that the waiver was executed after the running of the statute of limitations does not render it invalid. *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S. 295, 298-299; *Stange* v. *United States*, 282 U. S. 270, 273-275. And confessedly, the waiver would have been good, executed when it was, if the period of limitation had expired after June 2, 1924.

Nothing in the legislative history of § 278 indicates an intention to exclude cases like that at bar from the generality of those in which waivers may be given. The purpose of Congress in enacting paragraph (c) of § 278 indicates the contrary. Prior to the 1921 Act there was no statutory provision expressly authorizing waivers; but their execution had grown out of administrative practice. Doubt as to their validity in the absence of statute, however, had been raised; and the doubt in that situation was not removed until the decision in *Aiken* v. *Burnet*, 282 U. S. 277. The purpose of

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or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

"(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

Congress in enacting paragraph (d) of § 250 of the Revenue Act of 1921 and paragraph (c) of § 278 of the Revenue Act of 1924 was not to grant authority for waivers or to limit their effect, but to remove that doubt by expressly recognizing them. The latter paragraph substantially re-enacted paragraph (d) of § 250 of the Revenue Act of 1921.[2]

Both the language and the purpose of paragraph (e) are consistent with this view. It was pointed out in *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S. 295, 300, note 5, that paragraph (e) cannot have been intended to qualify every other subdivision in § 278. The petitioner assumes, in fact, that it does not qualify subdivisions (a) and (b), which provide, respectively, for assessment at any time in the case of false or fraudulent returns or failure to file returns, and in the case of deficiencies attributable to a change in deductions taken in amortization of war investments. That paragraph (e) does qualify paragraph (d), which extends the period in which collection may be made to six years after assessment, was decided in *Russell* v. *United States*, 278 U. S. 181. The petitioner argues that since paragraph (d) relates only to collection, and since the qualifications of paragraph (e) apply in terms to assessments as well, the latter paragraph must limit paragraph (e), the only remaining subdivision. But this conclusion does not necessarily follow. Congress may have inserted the reference to "assessments" in paragraph (e) in order to make it clear that the extension of time for collections should in no event be regarded as authorizing an assessment already barred by the applicable statute of limitations. Moreover, paragraph (d) alone marked a change in the policy of Congress.[3] Paragraph (e) was inserted to prevent the

[2]See H. Rep. No. 179, 68th Cong., 1st Sess., p. 26; S. Rep. No. 398, 68th Cong., 1st Sess., p. 32.

[3]See the committee reports, *loc. cit. supra*, note 2; also, Hearings on H. R. 6715 before Senate Committee on Finance, 68th Cong., 1st Sess., pp. 36, 39. As originally drafted, paragraph (d) authorized collection without limitation of time. See Hearings, *supra*, p. 39; Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, Senate Committee on Finance, 68th Cong., 1st Sess., p. 27. The limitation on collections of six years from the date of assessment was proposed by the Senate and agreed to by the House. See Conference Report, H. R. No. 844, 68th Cong., 1st Sess., p. 24. The 1921 Act, § 250 (d), had imposed a limit on collections of five years from the date of return. See Russell v. United States, 278 U. S. 181, 185.

section from being given a "retroactive effect."[4] To apply it to paragraph (e) would not serve that function. On the contrary, it would serve to cause a break in the policy of giving effect to waivers, —a policy expressly adopted in the Act of 1921 and avowedly continued by the Act of 1924. The disclaimer of an intention to "authorize an assessment" where "such assessment" was already barred cannot be taken to refer to assessments which were authorized by § 278 only in the sense that they were made pursuant to an agreement by the taxpayer of the kind which the Act continued to recognize and sanction.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[4]See Hearings on H. R. 6715 before the Senate Committee on Finance, 68th Cong., 1st Sess., p. 41 (Statement of A. W. Gregg, Treasury draftsman).